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THE  
INDIAN LAW REPORTS  
ALLAHABAD SERIES

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY  
THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL  
ON APPEAL FROM THAT COURT

REPORTED BY:

*Privy Council*

... C. SIDNEY SMITH, *Gray's Inn.*

*High Court, Allahabad*

.. B. K. MUKERJEE, M.A., LL.B.,  
*Advocate, High Court.*

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## CORRIGENDA

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- Page 20, line 3 from bottom, for "ponited" read "pointed".
- Page 141, line 22, for "and" read "2nd".
- Page 166, line 4, for "Ful" read "Full".
- Page 171, margin, below name of case read "Bennet, J.".
- Page 174, line 4 from bottom, after "(2)" insert a comma instead of a full stop.
- Page 184, line 13, for the double quotation marks substitute a single quotation mark.
- Page 192, last line, read "15" after the word "rule".
- Page 301, foot-note (1), for "(193" read "(1933)".
- Page 304, line 5 from bottom, for "vidence" read "evidence".
- Page 343, line 11 from bottom, for "estates" read "estate".
- Page 357, line 13, for "equesdem" read "ejusdem".
- Page 420, line 11, at the end of the line read "1".
- Page 447, line 8, insert a hyphen at the end of the line.
- Page 447, line 10, for "ting" read "that".
- Page 461, line 19, for "hand" read "kand".
- Page 505, line 4, after the word "pending" read "in sub-section"
- Page 523, line 7 from bottom, delete the comma after the word "consists".
- Page 548, line 21, for "Imperial" read "Implied".
- Page 618, foot-note, for "167" read "1167".
- Page 637, line 9 from bottom, insert a full stop at the end of the line.
- Page 705, line 10 from bottom, insert a hyphen at the end of the line.
- Page 729, foot-note (2), read the page as "190".
- Page 779, margin, for "Bennte, J.," read "Bennet, J."
- Page 866, foot-note (2), for "8 Bom. H. C. R.," read "6 Bom. H. C. R."

JUDGES OF THE HIGH COURT OF JUDICATURE  
AT ALLAHABAD

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1936

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*Chief Justice:*

The Hon'ble SIR SHAH MUHAMMAD SULAIMAN.

(On leave from 10th March to 5th April)

*Acting Chief Justice:*

The Hon'ble MR. JUSTICE JOHN GIBB THOM.

(Officiated from 10th March to 5th April)

*Judges:*

The Hon'ble MR. JUSTICE JOHN GIBB THOM.

The Hon'ble MR. JUSTICE NIAMAT-ULLAH.

The Hon'ble MR. JUSTICE EDWARD BENNET.

The Hon'ble MR. JUSTICE IQBAL AHMAD.

The Hon'ble MR. JUSTICE ARTHUR TREVOR HARRIES.

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The Hon'ble MR. JUSTICE UMA SHANKAR BAJPAI.

The Hon'ble MR. JUSTICE GANGA NATH.

The Hon'ble MR. JUSTICE HAROLD GORDON SMITH,

(Reverted on 11th May)

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1936

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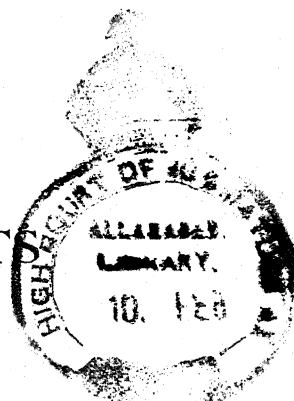
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THE  
INDIAN LAW REPORTS  
ALLAHABAD SERIES



FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice,  
Mr. Justice Bennet and Mr. Justice Harries

MUHAMMAD TAQI KHAN (PLAINTIFF) v. JANG SINGH  
(DEFENDANT)\*

1935  
March, 12

*Evidence Act (I of 1872), section 92—Oral evidence varying terms of sale deed—Evidence that the sale consideration actually agreed upon was less than that stated in sale deed—Distinction between a “term” of the sale and a recital of receipt of consideration.*

Where a part of the sale consideration is on the face of the document still outstanding and to be paid by the vendee, it is not open to him to produce evidence to show that there was a separate contemporaneous oral agreement that this sum would not be payable and was merely fictitious. The amount of sale consideration is a term of a deed of sale, and by section 92 of the Evidence Act no evidence of any oral agreement can be admitted, as between the parties to the deed of sale or their representatives, for the purpose of varying the amount.

The acknowledgment of receipt of the whole or part of the sale consideration in a deed of sale is not a term of the deed of sale, and oral evidence may be given to show that the amount acknowledged or any part of it was not received. By trying to show that the recital is wrong the party is merely trying to show that he made a wrong admission of a fact, whereas by attempting to show that the amount promised to be paid was different he is attempting to alter one of the conditions in the deed which still remains to be fulfilled.

\*Second Appeal No. 834 of 1933, from a decree of Gauri Prasad, District Judge of Farrukhabad, dated the 12th of January, 1933, confirming a decree of Muhammad Taqi Khan, Subordinate Judge of Farrukhabad, dated the 14th of September, 1931.

1935

MUHAMMAD  
TAQI  
KHAN  
v.  
JANG  
SINGH

Mr. F. Owen O'Neill, Dr. K. N. Katju and Mr. Shah  
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Messrs. K. Verma and Babu Ram Avasthi, for the  
respondent.

SULAIMAN, C.J.:—Three questions have been referred to this Full Bench for answer by the Division Bench before which the plaintiff's appeal arising out of a suit for sale on the basis of a mortgage deed came up for hearing. On the 17th August, 1926, a sale deed was executed by the plaintiff and his uncle along with their wives in favour of the two vendees including the present defendant. The sale deed purported to be for Rs.11,400, out of which a part was paid in cash and another part was set off against a previous debt and the balance of Rs.5,000 was stated to have remained in the hands of the vendees who were liable to pay the amount to the vendors. On the same date a mortgage deed was executed by one of the vendees in favour of the plaintiff and his uncle for this sum of Rs.5,000, under which the mortgagor agreed to pay this amount to the two vendors and hypothecated his immovable property as security for the amount. There was, of course, an admission that this sum was due under the contemporaneous sale deed and would be paid later. The present plaintiff admits to have received some payments and brought the suit to recover Rs.3,300, the balance out of Rs.5,000 which according to him had remained unpaid. The defendant set up the defence that the principal consideration of the sale deed was not Rs.11,400 but only Rs.8,400 and that the extra sum of Rs.3,000 had been entered therein fictitiously in order to defeat and delay possible pre-emptors. A question arose whether it was open to the defendant to adduce evidence to show that a part of the sale consideration was really fictitious. Such evidence was allowed by the courts below and they have come to the concurrent finding that this amount was in fact fictitious.

The *first* question referred to the Full Bench is: "Whether evidence tending to show that the consideration for the said sale was a lesser sum than that stated in the sale deed of the 17th August, 1926, was admissible."

The answer to this question depends on an interpretation of sections 91 and 92 of the Indian Evidence Act. Under the latter section, when the terms of any contract have been proved, no evidence of any oral agreement is to be admitted, as between the parties to any such instrument or their representatives, "for the purpose of contradicting, varying, adding to, or subtracting from, its terms". Under proviso (1), however, any fact which would invalidate any such document can be proved, and by way of illustration it is mentioned that want or failure of consideration can be proved. Obviously such want or failure of consideration as can be proved must be one which would invalidate the document.

There are several cases in support of the plaintiff appellant's case, which may be first mentioned briefly. In the case of *Adityam Iyer v. Rama Krishna Iyer* (1), it was laid down that the amount of the price agreed to be paid is an essential term of a contract of sale and that no evidence of an oral agreement at variance with the provisions of the deed is admissible. Accordingly the vendor in that case was not allowed to show that the true sale consideration, instead of the ostensible amount of Rs.35,000, was really Rs.36,000, the extra sum of Rs.1,000 having been agreed to be written off after delivery of possession. See also the cases of *Annada Charan Sil v. Hargobinda Sil* (2) and *Mothey Krishnayya v. Mohamed Galeb Sahib* (3).

In the case of *Lala Singh v. Basdeo Singh* (4), WALSH, J., declined to allow evidence to be considered which was intended to show that the true consideration, instead of Rs.3,000 mentioned in the sale deed, was in fact Rs.2,500 only, and he thought that an attempt to

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(1) (1913) I.L.R., 38 Mad., 514.

(2) A.I.R., 1923 Cal., 570.

(3) A.I.R., 1930 Mad., 659.

(4) A.I.R., 1923 All., 429.

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prove that a sale really took place for one sum when the deed says that it took place for another sum was not within the proviso of section 92 and could not be allowed to be made. The learned advocate for the defendant had to concede that this case is a direct authority in favour of the plaintiff appellant.

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He, however, relies first on certain earlier cases in support of his contention that evidence is admissible.

In the case of *Balkishen Das v. Legge* (1) their Lordships of the Privy Council disallowed oral evidence for the purpose of ascertaining the intention of the parties to the deeds in question, but laid down that the question whether the document was an out and out sale or whether it was a mortgage by conditional sale could be decided on a consideration of the documents themselves with only such extrinsic evidence of such surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts. By the very definition of mortgage by conditional sale as now contained in the Transfer of Property Act, a transaction which is ostensibly one of sale would be a mortgage by conditional sale if there is an agreement to reconvey the property.

In the case of *Sah Lal Chand v. Indarjit* (2), their Lordships of the Privy Council affirmed the judgment of this Court and approved of the proposition that where there had been a false acknowledgment by recital in a deed of sale of the payment by the purchaser of the consideration money and its receipt by the vendor, it is open to the latter to prove that no consideration money was actually paid. Their Lordships took care to point out that section 92 did not indicate that no statement of fact in a written instrument was to be contradicted by oral evidence. Accordingly, when there was a mere acknowledgment of receipt of consideration, it was laid down that there was no infringement of that section to accept proof that by a collateral

(1) (1899) I.L.R., 22 All., 149.

(2) (1900) I.L.R., 22 All., 370.

arrangement between the parties the consideration money had in fact remained with the purchaser in his hands for the purposes and under the conditions agreed between them. These cases, therefore, do not support the contention urged on behalf of the defendant.

But great reliance is placed by the learned counsel on the case of *Hanif-un-nissa v. Faiz-un-nissa* (1), decided by their Lordships of the Privy Council. In that case Hanif-un-nissa had executed a document which purported to be a sale deed for a sum of Rs.60,000 in favour of her daughter and had acknowledged the receipt of the entire consideration in the deed. She brought a suit on the allegations that the document was a fictitious document and that really no interest in the property had passed to the transferee. In the alternative she claimed that it was a sale deed the consideration for which had not been paid to her and she should be given a decree for the full amount. The defendant on the other hand denied that the transaction was a fictitious transaction, but at the same time did not admit that it was a sale transaction and pleaded that it was a transaction of gift under which she was not liable to pay any amount at all. The trial court did not come to the finding that the transaction was wholly fictitious, and holding it to be a deed of gift, dismissed the plaintiff's claim for recovery of the sale price as well. On appeal before the High Court only one point appears to have been pressed on her behalf, for the judgment of the High Court opened with the remark, "The only point involved in this appeal is whether or not extrinsic evidence is admissible for the purpose of showing that a document which purports to be and is on the face of it a deed of sale is in reality a deed of gift." The learned Judges came to the conclusion that the defendant was debarred from showing a different nature of the transaction and that section 92 of the Indian Evidence Act was in her way, and accordingly decreed the plaintiff's claim

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for recovery of Rs.60,000 on the footing that it was a sale transaction, which was not a fictitious transaction. When the matter went up in appeal before their Lordships of the Privy Council, their Lordships thought that the decree appealed from could not be sustained and were of the opinion that the proper course was to remand the case to the High Court to be dealt with on the evidence. The case was accordingly remanded. Another Division Bench of this Court then disposed of the appeal and dismissed the suit, holding that the transaction was one of gift, pure and simple.

The learned advocate for the defendant relies on this case strongly and urges before us that this is conclusive authority that evidence should be allowed to show that the sale consideration was not what was recited in the deed. It should, however, be borne in mind that in that case, although the plaintiff's case that the document was fictitious had apparently been abandoned in the High Court and was certainly not made the basis of the decision by the High Court, there was an admission by the plaintiff that the whole of the consideration had been paid to her and that nothing was due and owing to her from the defendant. The deed on the face of it therefore showed that there was no longer any pecuniary liability on the transferee at all. The defendant took up the same position that there was no further pecuniary liability on her, but explained this circumstance by showing that although there was a recital that money had in fact been paid, the true fact was that it was understood between the parties that no money should ever be paid and was therefore not paid. The decision of their Lordships of the Privy Council is accordingly no authority for the proposition that where a part of the sale consideration is on the face of the document still outstanding and is agreed between the parties to be payable in future, it is open to the vendee to show that that sum was a fictitious amount.

This Privy Council case was followed by a Division Bench of this Court in the case of *Chunni Bibi v. Basanti Bibi* (1). In that case the ostensible sale consideration stated in the deed was Rs.40,000 and the vendor had admitted receipt of Rs.37,600 and had acknowledged payment in the deed; the balance of Rs.2,400 was to be paid in cash at the time of the registration. The vendor, however, brought the suit for recovery of Rs.24,874 out of the sum of Rs.37,600 on the allegation that although it had been admitted in the deed that the sum had been paid, it had in fact not been paid. The defendant turned round and although denying liability to pay this amount pleaded that this sum had been fictitiously entered in the deed and that it was wrongly stated to have been paid, and that the true fact was that it was never intended between the parties that it should be paid and that accordingly it had not been paid. The Bench, purporting to follow the decision of their Lordships of the Privy Council, held that such evidence was admissible. One of the reasons suggested was that where a plaintiff is allowed to go back upon the recital in the deed, the defendant is also entitled to produce oral evidence in support of her own allegations. It is not possible to admit oral evidence on any such equitable ground. The question whether evidence is admissible or not is a legal question which is to be decided on the proper interpretation of the relevant sections of the Indian Evidence Act.

Under section 91, when the terms of a contract have been reduced to the form of a document, no evidence can be given in proof of the terms of such contract except the document itself, or secondary evidence of its contents where secondary evidence is admissible. It follows that if the contract between the parties has been reduced to the form of a document, they cannot be allowed to set up any other contract at variance with the terms of the document.

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Section 92 of the Indian Evidence Act provides that where a contract has been entered into between two parties and certain terms have been reduced to the form of a document, then neither party, with certain exceptions, can be allowed to go back upon the written document and either contradict, vary, add to or subtract from its terms. Both parties must be tied down to the agreement which they chose to reduce into writing. The exceptions are contained in the various provisos. The section, therefore, prevents a party from varying the terms of the document in a way which would be contrary to its plain language, but where other evidence is sought to be produced in order to invalidate the document itself, then, of course, there is no prohibition, because obviously the invalidation of a document is not a variation of its terms but its very negation.

Where the dispute is as to whether the transferee had agreed to pay Rs.5,000 or Rs.3,000 in future, the agreement is certainly a part of the terms of the document and contains a promise of the transferee and therefore an obligation and liability on him to pay the stated amount. On the other hand, where the dispute is as to whether a sum of Rs.5,000 stated to have already been paid and received was in fact Rs.5,000 and not a smaller sum of Rs.3,000, the question is one of fact and relates to the exact amount which was paid and received. Substantially this is no part of the terms of the contract, for there is no further obligation on the transferee to pay the stated amount. In reality the question, what was the actual amount paid in the past, i.e., the recital of the amount said to have been received, is not very material if both parties admit that that amount is no longer due. A recital as to the past payment is a recital of a fact and there is no estoppel against the person who made the admission. There is only a presumption against him arising out of his admission, but that presumption is by no means conclusive or irrebuttable. On the other hand, where there is a promise to pay a certain amount in

future, it is by no means a statement of a fact which may be shown to be incorrect, but is the undertaking of a liability under a written document which cannot be allowed to be departed from. By trying to show that the recital is wrong the party is merely trying to show that he made a wrong admission; while by attempting to show that the amount promised to be paid was different he is attempting to alter one of the conditions in the deed which still remains to be fulfilled. It seems to me that there is under this section no prohibition against the party to a document restraining him from trying to show that a statement of fact contained in the document was in reality not true, but there is certainly a prohibition against him from attempting to show that one of the essential terms of the document which creates an existing liability on him was wrong, and therefore not binding upon him. If the admission has been obtained by means of fraud, force or misrepresentation or is in any other way invalid, it is open to the party aggrieved to have the document set aside, in which case it would fall to the ground on account of its invalidity, but a party cannot accept a part of the document and its terms and repudiate the other parts. Where a defendant says that the transaction in question was not a sale but a mortgage or that it was not a sale but a gift, he is attempting to show that the true nature and character of the transaction was different from what it ostensibly was. He need not necessarily be varying its terms, provided such terms can be gathered from the documents in existence and, as laid down by their Lordships, from the surrounding circumstances showing the relation to existing facts. But where a party admits that the transaction was of the nature and character as appears from the document, but wishes to show that the consideration still payable was less or more than what was entered therein, he is accepting the transaction in part and trying to alter another part of it. Such a course is certainly not open to the party.

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Speaking personally for myself, I think the case of *Hanif-un-nissa v. Faiz-un-nissa* (1), decided by their Lordships of the Privy Council, could not be distinguished in *Chunni Bibi v. Basanti Bibi* (2). It is suggested that the distinction was that in that case the plaintiff had at first alleged that the transaction was wholly a fictitious one, though at a later stage that position was actually abandoned. It would, to my mind, have made no difference even if she had brought a suit on the simple allegation that the sum of Rs.60,000 was due to her on the sale deed, for the defendant would still have been allowed to prove that what she had admitted to have received and therefore admitted was not due from the defendant was in fact not due because it had never been agreed to be paid. Their Lordships no doubt sent the case back for decision on the merits. But I would take it that their Lordships meant that the case should be decided on the evidence which the High Court had declined to examine, thinking that section 92 was a bar, that is to say evidence relating to the question as to whether the transaction was a gift transaction, that is such that there was no consideration outstanding. When the case came back to the High Court, the only point that was considered was whether the transaction was a gift or a sale, and the finding being in favour of the defendant the suit was dismissed. Had the further question as to whether the transaction was a fictitious one also arisen, the inquiry would not have been confined to these natures of the transaction only. It was on taking this view of the Privy Council decision that the Division Bench in the case of *Chunni Bibi v. Basanti Bibi* (2) allowed evidence to be given to show that part of the consideration which had been admitted by the plaintiff in that suit to have been received and therefore no longer due was in fact no longer due, though on the ground that it had been understood that nothing would be payable at all. In view of the deci-

(1) (1911) I.L.R., 33 All., 340.

(2) (1914) I.L.R., 36 All., 537.

sion of their Lordships of the Privy Council, I am unable to hold that this view was in any way erroneous.

At the same time I am clearly of the opinion that the case of *Hanif-un-nissa* (1) did not decide the wider question that it is open to the defendant to show that the consideration mentioned in the sale deed was fictitious even though there was under the deed an existing liability on the defendant to pay such an amount. The distinction to my mind is this: Where the written document purports to show that property was transferred by one party to the other and that there was no longer any further liability on the latter to pay any amount to the former and goes on to add that this is so because the additional amount which the latter was liable to pay had already been paid previously, then the defendant is entitled to say that there was a contract of transfer of the property and that property passed from one to the other and further to agree that there was no longer any liability on him to pay any additional amount, but may say that the reason why there is no longer any liability on him is not that the amount stated to have been paid previously was in fact paid, but that it had never been agreed upon that it would be paid at all and was therefore not paid. The dispute between the parties whether the amount which was admitted by one party to have been paid was therefore not due or whether it was agreed by both the parties not to be payable and was therefore not payable, does not raise any question of the existing rights and liabilities between the parties under the document, but merely recites a past event. I therefore do not consider that there is any attempt to vary the terms affecting the rights and liabilities of the parties, if it is tried to be shown that the recital of the past event was slightly inaccurate, although the effect of the document was the same as appears from it.

In the present case, however, the sum of Rs.5,000 was expressly stated to be still due from and payable by the

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vendees. Indeed, they executed a separate mortgage deed in order to secure this amount. To allow one of the vendees now to go back upon this covenant would be to allow them to repudiate their liability to pay Rs.5,000 which, under the document, they were bound to pay. I do not consider that such a covenant is a mere recital of a fact which can be shown to be wrong; it would really be varying the terms of the document if evidence to show the contrary were permitted.

I have, therefore, no hesitation in holding that where under a written document there is some amount still outstanding which under its terms has to be paid by the transferee, then it is not open to the transferee to produce oral evidence to show that there was a separate contemporaneous oral arrangement under which it was agreed that this sum would not be payable, for such a course would be allowing him to contradict the terms of the document and would be contrary to the provisions of section 92 of the Evidence Act.

The *second* question referred to the Full Bench is: "Whether evidence tending to show that the mortgage of the 17th August, 1926, was for a lesser sum than that stated in the mortgage deed of that date was admissible."

So far as the amount of the mortgage money as stated in the mortgage deed is concerned, it is always open to the mortgagor to say that he had not received the full consideration, because the admission that so much had been paid by the mortgagee to the mortgagor is a mere acknowledgment of the receipt of the amount paid in the past and is therefore a recital as to a fact, and there is nothing in section 92 which would debar a mortgagor from saying that although he admitted having received the full amount he had not in fact received it. On the other hand, if a dispute arose as to whether the exact amount mentioned in the mortgage deed to be paid in future was the amount agreed to be advanced or was more or less, then both parties would be estopped from going behind the recital, because there would be an

implied promise on the part of the mortgagee to advance the whole of that amount.

The present defendant, in my opinion, is not debarred from producing oral evidence in this case because of the terms entered in the mortgage deed, but the bar is really created by the execution of the sale deed, for in my opinion he is entitled to say that the money sought to have been borrowed by him had not in fact been borrowed, though he cannot be allowed to say that the balance of the sale consideration was not Rs.5,000.

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The *third* question referred to us is: "In any event whether it was open to the defendant respondent to say that the sums stated in the two documents were not the true sums, having regard to the fact that it was his case that the consideration in the sale deed was incorrectly stated in order dishonestly to defeat the possible rights of a third person."

In view of the answers given to the first two questions, as to which all of us are agreed, though perhaps for different reasons, it is not necessary to answer the third question. There is the further difficulty that facts have not been gone into by the courts below as to whether any person was in fact defrauded. Where a plaintiff comes to court and wants to go back upon the terms of a contract entered into by him on the ground that such terms had been fraudulently entered by himself in order to cheat a third person and such fraud has actually succeeded, there can be no doubt that the plaintiff would be estopped from alleging his own fraud and setting it up as against the defendant. The question whether a defendant can in similar circumstances be allowed to plead that the terms were fraudulent and that accordingly he may be allowed to show that there was a fraud because the plaintiff was also a party to it, may be a different question. It is, however, unnecessary to answer it in this case.

BENNET, J.:—I am in agreement with the replies of the Hon'ble CHIEF JUSTICE in the negative to questions

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1 and 2 referred to this Full Bench and I also agree that question 3 need not be answered.

I desire to add some remarks in regard to the ruling of a Bench of this Court in *Chunni Bibi v. Basanti Bibi* (1). On page 544 it is stated: "The main contention of the learned advocate for the appellant (defendant) was that if the respondents (plaintiffs) are entitled, as they undoubtedly are, to go behind the recital and admission in the deed and prove that the entire consideration has not been paid, it is open to the appellant to produce oral evidence as to the true nature and extent of the consideration." In that case the plaintiffs sued for the alleged balance of the purchase money although the sale deed acknowledged payment in full. This could be done under section 92, proviso (1) of the Evidence Act, as this allows proof of want of consideration, and it is to be noted that sections 91 and 92 do not deal with the question of mere receipts or acknowledgments that consideration was received. The defendant in reply desired to produce oral evidence that the sale consideration was less than that stated in the sale deed. On page 547, CHAMIER, J., stated what he considered was the reason for the decision of their Lordships of the Privy Council in *Hanif-un-nissa v. Faiz-un-nissa* (2), as follows: "In some of the cases the decision rests upon a ground which applies as much to one kind of case as to the other, namely, that if one party to a deed alleges and proves that the consideration, the receipt of which was acknowledged in the deed, did not pass, the case falls within the first proviso to section 92 of the Evidence Act and the other party is at liberty to prove what the real consideration was. It appears to me that it must have been upon this ground that their Lordships of the Privy Council admitted the evidence tendered by the defendant in that case." He further held: "On the authorities I would hold that as the respondents (plaintiffs) have alleged and proved that

(1) (1914) I.L.R., 36 All., 537.

(2) (1911) I.L.R., 33 All., 340.

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the whole of the consideration, receipt of which is acknowledged in the deed, did not pass, the appellant is entitled to produce oral evidence in support of her allegations." The late Mr. Justice BANERJI held on page 549 in regard to the ruling of their Lordships of the Privy Council: "Their Lordships of the Privy Council reversed this decision and held that oral evidence could be given by the defendants to prove the real nature of the transaction. Apparently their Lordships were of opinion that the case would come within the first proviso to section 92. I am unable to distinguish the present case from the principle of the ruling above mentioned. In view of that ruling I must hold that the appellant is entitled to produce oral evidence to prove her allegations." It is clear therefore that both the learned Judges in this case admitted oral evidence for the defence because they considered that the case was covered by the ruling of their Lordships of the Privy Council in *Hanif-un-nissa v. Faiz-un-nissa* (1). Now in the ruling of their Lordships to which reference was made no reasons have been given for the decision. Their Lordships merely state on page 341: "Their Lordships think the decree appealed from cannot be sustained. They are of opinion that the proper course will be to remit the case to the High Court to be dealt with on the evidence." I consider that if this ruling of their Lordships is to be taken as an authority for a proposition of law, then that proposition of law must be applied to a case where the facts are similar. Is it correct to say that the facts in *Chunni Bibi v. Basanti Bibi* (2) cannot be distinguished from the facts in *Hanif-un-nissa v. Faiz-un-nissa* (1)? The facts of the case before their Lordships of the Privy Council are quoted in some greater length in the report of the judgment of this Court in *Faiz-un-nissa v. Hanif-un-nissa* (3), and I have also referred to the paper book of this case which was before their

(1) (1911) I.L.R., 33 All., 340.

(2) (1914) I.L.R., 36 All., 537.

(3) (1905) I.L.R., 27 All., 612.



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Lordships of the Privy Council. In paragraph 3 of the complaint it was set out: "After the death of Kunwar Abdul Ghafur Khan, Abdus Shakur Khan, son of the plaintiff, became a great prodigal and profligate person and always compelled the plaintiff to give him money by exercising undue influence on her. Therefore, under a pretence, to protect herself against his undue influence, the plaintiff executed a fictitious sale deed on the 27th day of September, 1889, in respect of the property mentioned below, in favour of all the three defendants (who were minors), merely with a view to change the names, by entering Rs.60,000 in it as the amount of consideration." These defendants were the defendants first party, the daughter of the plaintiff and her grandson and grand-daughter. The first relief asked for was the recovery of possession of the property and a declaration that the document of the 27th of September, 1889, had no effect and that the defendants had thereunder acquired no right in the property claimed. The second relief was: "If the court does not think it proper to award possession of the property claimed to the plaintiff, it may pass a decree in her favour for Rs.60,000, the amount of consideration entered in the sale deed, etc." The main case, therefore, of the plaintiff was that the document in question was a fictitious document. The pleading of the contesting defendants, who were transferees from the persons in favour of whom the document had been executed, was that the transaction was indeed fictitious in the sense that it was not a sale deed but that there was a transfer by way of gift. The finding of the trial court was that the transaction amounted to a gift, and the suit of the plaintiff was dismissed. The plaintiff appealed to the High Court, and the first ground of appeal set out in the memorandum was: "Because upon the evidence it has been fully established that the deed of sale, dated the 27th September, 1889, . . . was fictitious and not a real transaction, and that no transfer of property took place thereunder"; and the second ground set out that

the plaintiff continued in possession of the property, and the third ground set out that in the absence of consideration and transfer of possession the said deed was invalid and void under the Muhammadan law. It was only when we come to the sixth ground that the claim was put forward, "Because in any case the court below ought to have decreed the claim for the consideration of the sale claimed in the suit." There is nothing whatever to show on the record that the appellant plaintiff abandoned her first three grounds in the memorandum of appeal. It is true that the judgment of this Court contained in *Faiz-un-nissa v. Hanif-un-nissa* (1) begins by stating: "The only point involved in this appeal is whether or not extrinsic evidence is admissible for the purpose of showing that a document which purports to be, and is on the face of it, a deed of sale is in reality a deed of gift." Now it is impossible to say what were the reasons which induced their Lordships of the Privy Council to allow oral evidence in this case, because their Lordships considered that this was not a case in which any general principle should be laid down, and for that reason apparently they did not formulate their reasons. It is therefore in my opinion an extension of the doctrine of this particular case to apply it to a case such as *Chunni Bibi v. Basanti Bibi* (2), where the conditions which I have set out do not exist. It may have been that their Lordships considered that where the plaintiff herself set out in the plaint that the document was a fictitious document she could not at the same time claim that under section 92 of the Evidence Act the defendant was debarred from proving what the real nature of the transaction was. It is to be noted that in section 92 the language used is: "When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document *have been proved* according to the last section, no evidence of any oral agreement, etc." Now

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(1) (1905) I.L.R., 27 All., 512.

(2) (1914) I.L.R., 36 All., 537.

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in section 91, the last section, it is laid down that "When the terms of a contract or of a grant or of any other disposition of property have been reduced to the form of a document and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter except the document itself . . . ."

In a case where a party produces a document and relies on the document to prove the terms of a transaction of the nature stated in these sections 91 and 92, then that party may claim the protection of these sections and say that it is not open to the opposite party to produce oral evidence contrary to the sections. But it would be obviously a different proposition to state that where a plaintiff produces a document and alleges it to be fictitious, at the same time the plaintiff can rely on these sections for preventing oral evidence by the opposite party of the real nature of the transaction. Some argument was made that a plaintiff might be allowed to make a pleading in the alternative as was done in this case. That may possibly be so, but in my opinion a party cannot give evidence in the alternative. The sections relate to the case of where a document has been proved. I do not consider that a plaintiff can appear in the witness box in a court of law and state in the alternative: "I executed this document as a genuine sale" and also "I executed this document merely as a fictitious document". When it is a question of evidence a statement must be precise. The plaintiff executed the document. It was within her knowledge whether she intended it to be a genuine transfer or merely a fictitious document. I do not think that she can place her evidence in the alternative before the court, stating at the same time that the document was both genuine and fictitious. It is not possible for me to say that these were considerations which weighed with their Lordships of the Privy

Council in the case of *Hanif-un-nissa v. Faiz-un-nissa* (1), but I can and do point out that these considerations were present in that case and that there were no similar considerations present in the case of *Chunni Bibi v. Basanti Bibi* (2). It is precisely because in the latter case those considerations were not present that I consider that that ruling is incorrect in assuming that the facts in that ruling were similar to the facts in the ruling in *Hanif-un-nissa v. Faiz-un-nissa* (1). Apart from the alleged authority in the ruling of their Lordships of the Privy Council in *Hanif-un-nissa v. Faiz-un-nissa* (1), the ruling in *Chunni Bibi v. Basanti Bibi* (2) does not set out any definite authority for the proposition it lays down and it does not attempt to show how the proposition which it lays down can be brought under the terms of section 92 of the Evidence Act. As I have indicated, the ruling of their Lordships of the Privy Council can be brought under the terms of that section but the ruling in *Chunni Bibi v. Basanti Bibi* (2) cannot in my opinion be brought under section 92 of the Indian Evidence Act. For these reasons I consider that the extension of the doctrine of their Lordships of the Privy Council to a different set of circumstances by *Chunni Bibi v. Basanti Bibi* (2) is an extension which should not be followed by this High Court. As a result I consider that the following three propositions of law are established, and I understand that my learned brother Mr. Justice HARRIES agrees with them all and that the learned CHIEF JUSTICE agrees with the first two: (1) The amount of sale consideration is a term of a deed of sale. When the terms of a deed of sale have been proved according to section 91 of the Evidence Act, no evidence of any oral agreement or statement shall be admitted, as between the parties to the deed of sale or their representatives, for the purpose of contradicting, varying, adding to, or subtracting from the amount of sale consideration. (2) The acknowledgment of receipt of the

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(1) (1911) I.L.R. 33 All., 340.

(2) (1914) I.L.R., 36 All., 537.

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whole or part of the sale consideration in a deed of sale is not a term of the deed of sale and oral evidence may be given to show that the amount acknowledged or any part of it was not received. (3) When one party tenders oral evidence to prove that the amount acknowledged or any part of it was not received, this does not give the other party a right to produce evidence of any oral agreement or statement that the amount of sale consideration was less than what is entered in the deed of sale.

HARRIES, J.:—I agree that the questions should be answered in the manner indicated by the Hon'ble CHIEF JUSTICE.

The price stated in a sale deed is in my view a term of the contract and that being so, it is not open to either party to tender oral evidence with a view to showing that the price stated in the sale deed is greater or less than the actual price agreed between the parties.

It has been urged before us, however, that the decision of their Lordships of the Judicial Committee of the Privy Council in *Hanif-un-nissa v. Faiz-un-nissa* (1) does allow a party to give oral evidence to vary the price stated in a written contract. The facts in that case were peculiar and exceptional. Both parties to the sale deed admitted that there never was a sale at all and that the sale deed as such was a purely fictitious document. It was common ground that the deed in no sense represented the transaction between the parties and that when the deed was executed there was no intention on the part of either of the parties to enter into a contract of sale. In those circumstances their Lordships of the Judicial Committee of the Privy Council held that oral evidence could be admitted to show what was the real nature of the transaction between the parties. As pointed out by my learned brother BENNET, J., their Lordships give no reason for their decision and in my judgment the decision must be confined to the particular

(1) (1911) I.L.R., 33 All., 340.

facts of that case. I entirely agree with the Hon'ble CHIEF JUSTICE and my learned brother BENNET, that the case of *Hanif-un-nissa v. Faiz-un-nissa* (1) is no authority for the general proposition that a party may tender oral evidence with a view to showing that the price stated in a contract is not the true price.

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In the case of *Chunni Bibi v. Basanti Bibi* (2) a Divisional Bench of this Court purported to follow the case of *Hanif-un-nissa v. Faiz-un-nissa* (1). In that case the vendor tendered evidence to show that, though it was stated in a sale deed that the consideration had been paid, it had not in fact been so paid. In those circumstances it was held that it was open to the other party to the contract to show that the price stated in the sale deed was not the true price agreed between the parties. The statement that money has been received is a mere statement of fact and is in no way a term of the contract. That being so, oral evidence may be adduced to contradict such a statement of fact, as the admission of such evidence in no way contravenes the provisions of section 92 of the Indian Evidence Act, which deals only with evidence tending to contradict, vary, add to or subtract from the terms of a contract, grant or other disposition of property. It is difficult, however, to understand why in a case where one party to a contract is entitled to tender oral evidence to contradict a statement of fact contained in a written contract, the other party to the contract should be entitled to give evidence which is made inadmissible by section 92 of the Indian Evidence Act. In my judgment there is nothing in the case of *Hanif-un-nissa v. Faiz-un-nissa* (1) to warrant the view taken by the Bench of this Court in *Chunni Bibi v. Basanti Bibi* (2), and I agree with my learned brother BENNET, J., that this latter case cannot be regarded as good law and should not be followed. In conclusion I desire to add that I agree with the three propositions of law

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(1) (1911) I.L.R., 33 All., 340.

(2) (1914) I.L.R., 36 All., 537

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enunciated by my learned brother BENNET, J., in the concluding portion of his judgment.

By THE COURT:—The answer to the first question is in the negative.

The answer to the second question is that it is not open to a mortgagor to say that the mortgage transaction was not for the sum stated therein, but it is open to him to show that he had not in fact received the full amount of the mortgage money.

The third question remains unanswered.

### TESTAMENTARY JURISDICTION

*Before Sir Shah Muhammad Sulaiman, Chief Justice,  
 and Mr. Justice Bennet*

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IN THE MATTER OF THE ESTATE OF ALICE SKINNER\*

*Probate court—Functions of—Questions of title or interpretation arising after grant of probate and in course of administration of the estate—Jurisdiction.*

After probate has been granted it is not the function of the probate court to decide questions of title, or of interpretation of the will, arising in course of administration of the estate by the executor; they are matters which should be decided in a regular suit.

Mr. M. A. Aziz, for the applicant.

Messrs. B. E. O'Connor and G. S. Pathak, for the opposite party.

SULAIMAN, C.J. and BENNET, J.:—This is an application against an executor to whom probate has been granted by this Court, calling upon him to render and explain all accounts of the various estates, to deliver to the petitioners their full share in the estate of the deceased, and to deliver possession to them of their share in the movable property. The application winds up by asking for the removal of the executor, or in the alternative for an injunction against him, and for costs. We think that this application is utterly misconceived. It

\*Testamentary Case No. 10 of 1923.

is not the function of this Court to decide questions of title or interpret the true meaning of the will. That is a matter which should be fought out in a regular suit. No breach of trust has been alleged in the application except the dispute as regards the applicants' share. We do not think that we can grant the prayers asked for. The application is accordingly dismissed.

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## REVISIONAL CRIMINAL

*Before Sir Shuh Muhammad Sulaiman, Chief Justice,  
and Mr. Justice Bennet*

EMPEROR *v.* SAHDEO RAM\*

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March, 15

*Oaths Act (X of 1873), sections 6, 13—Child witness—No exemption from oath or affirmation—"Omission to take oath"—Deliberate omission to administer oath—Criminal Procedure Code, section 423(1)(b)—Appellate court ordering the accused to be committed for trial—Procedure—Fresh proceedings under chapter XVIII not contemplated.*

If a child of tender years fulfils the criterion for a witness laid down by section 118 of the Evidence Act, i.e. he is able to understand the questions put to him and to give rational answers to them, then it is obligatory on the court, under section 6 of the Oaths Act, to administer oath or solemn affirmation to him. The Oaths Act does not recognize any criterion that oath or affirmation may be dispensed with because the child, being of tender years, can not understand its significance, although he is sufficiently grown up to be able to understand, and give rational answers to, questions put to him.

Where the court deliberately refrained from administering oath or solemn affirmation to a child witness on the ground that the child could not understand the nature and significance of an oath, the defect was cured by section 13 of the Oaths Act. That section covers both accidental omissions and intentional omissions to administer oath or affirmation.

[*Per* SULAIMAN, C.J.—There may be extreme cases, e.g. where a court defies the law, and knowing that the law requires an oath or solemn affirmation to be given to an adult witness deliberately omits to administer it or prevents the witness from

\*Criminal Revision No. 996 of 1934, from an order of V. Mehta, Additional Sessions Judge of Ghazipur, dated the 5th of November, 1934.



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making it, in which case it may be difficult to say that such an act was a mere omission within the meaning of section 13 of the Oaths Act. Again, where parties agree to abide by the statement on oath of a referee, it can not be contended that an omission to administer oath to the referee would be cured by section 13.]

Under section 423(1)(b) of the Criminal Procedure Code, in an appeal from a conviction the appellate court may, *inter alia*, order the accused person to be committed for trial. The section does not require that the appellate court, when doing so, should order the Magistrate to commit the accused for trial. It is, therefore, open to the appellate court either itself to commit the accused for trial to the sessions court or to direct a Magistrate to commit him for trial. Where it adopts the latter course, it does not give the Magistrate any jurisdiction to make any further inquiry and possibly arrive at the conclusion that there are no materials for a commitment. The trial already held is sufficient for the purposes of chapter XVIII of the Code, and it is not necessary for the Magistrate to hold an inquiry *de novo* and follow the provisions of all the sections in that chapter. The only thing for the Magistrate to do is to frame a charge or an amended charge under section 210 of the Code, to take the list of witnesses under section 211 and even to take witnesses for the accused under section 212 and then to make a formal order of commitment under section 213.

Sir Charles Alston and Mr. K. D. Malaviya, for the applicant.

The Assistant Government Advocate (Dr. M. Waliullah), for the Crown.

BENNET, J.:—This is a criminal revision on behalf of one Sahdeo Ram, who has been convicted by an Assistant Sessions Judge under section 377 of the Indian Penal Code and sentenced to two years' rigorous imprisonment, 12 stripes and a fine of Rs.100 or in default four months' further rigorous imprisonment. He appealed to the Sessions Judge and his appeal was dismissed. This revision is filed against the appellate order of the Sessions Judge. The facts found by the sessions court were that a small boy, Madan, aged 6½ years, was playing with another boy at the house of the accused and that the accused took him into a room and

committed the offence of sodomy on him and the boy Madan was seen by two witnesses to run out of the house of the accused weeping and the boy went to his father and told his father his story and took his father with a constable to the house of the accused and the boy pointed out the house and a head constable was called and the boy pointed out the accused and the accused was arrested and taken to the thana. On the next day medical examination by the Civil Surgeon took place of the boy and of the accused, and injuries were detected on the anus of the boy which showed that he had been a victim of sodomy and an abrasion was found on the penis of the accused, which the medical witness stated might have been caused by committing sodomy. There were also some blood stains on the *dhoti* of the boy, and none on the *dhoti* of the accused and the *dhoti* of the boy was also stained with some kind of oil. This was certified by the Chemical Examiner, and the Imperial Serologist stated that the *dhoti* was stained with human blood. A number of witnesses were produced at the trial, two of whom stated that they saw the boy coming from the house of the accused weeping, and the medical witness appeared before the Magistrate and gave his evidence. The trial in the first place took place before a Magistrate. The Magistrate convicted the accused under section 377, Indian Penal Code, and sentenced him to 18 months' rigorous imprisonment and a fine of Rs.300. The accused made an appeal to the Sessions Judge. The Sessions Judge was of the opinion that the sentence passed by the Magistrate was quite inadequate and that the case ought to have been committed to sessions. He passed an order stating: "I, therefore, in the exercise of the power conferred on me by section 423(b) of the Criminal Procedure Code reverse the finding and sentence of the learned Magistrate and direct him to commit the case to the sessions for trial." On this order the Magistrate corrected the charge sheet into a charge triable by the court of

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session and passed an order: "Under the order of the Sessions Judge, dated the 5th July, 1934, I commit the accused to the court of session where he will stand his trial. I have amended the charge and explained it to the accused." Some argument was made that the accused did not have sufficient opportunity for summoning witnesses, but the record shows that the Magistrate called on the accused to furnish a list of witnesses when he amended the charge and the accused did in fact file such a list next day. The case was tried by an Assistant Sessions Judge and no less than 12 witnesses were produced for the defence. Several points of law have arisen in this proceeding. The first point of law which was argued is in regard to the method adopted by the Assistant Sessions Judge in regard to the boy Madan. This boy was called as prosecution witness No. 2 and the court noted: "No oath was administered; being of tender age cannot understand its significance." The boy then made a statement which was recorded in full, more than two typed pages, of which the cross-examination occupied rather more than half. It is clear to us that the boy fulfilled the criterion for a witness laid down by section 118 of the Indian Evidence Act and that he was not a person who was prevented by tender years from understanding the questions put to him or from giving rational answers to those questions. In fact if he had been prevented by his tender years from being able to understand the questions and giving right answers his statement would probably not have been taken at all. He having given his statement at a considerable length and in an intelligent manner is a person who according to section 118 of the Indian Evidence Act should have testified as a witness. Now under the provisions of section 6 of the Oaths Act, where a witness has an objection to make an oath he shall make an affirmation, and in every other case he shall make an oath. The Oaths Act does not recognize the criterion adopted by the Assistant Sessions Judge that an oath

should not be administered because a child being of tender years cannot understand its significance. The oath, therefore, should have been made by this boy Madan under section 6 of the Oaths Act. The oath was not made and the question arises whether this omission comes or does not come under the language of section 13 of the Indian Oaths Act which states: "No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth."

On the one hand, on behalf of the accused it has been argued with great ability by Sir *Charles Ross Alston* that the words "No omission to take any oath or make any affirmation" mean "no accidental omission" and that those words cannot cover the present case where the court deliberately refrained from administering an oath to this child on the ground that the child could not understand the nature of the oath. On the other hand, it is argued on behalf of the Crown that the words "No omission to take any oath" are not qualified in any way by the statute and that it is improper for the courts to read into that section the word "accidental" when the word "accidental" is not in the section. This is a matter on which different views have been taken in this High Court and in other High Courts. In the case of *Queen-Empress v. Maru* (1) a learned single Judge, the late Mr. Justice MAHMOOD, took the view that these words in section 13 will only cover an accidental omission; and the view was taken in *Queen-Empress v. Lal Sahai* (2) by a Bench of this Court that having regard to the language of the Oaths Act a court has no option, when once it has elected to take the statement of a

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(1) (1888) I.L.R., 10 All., 207.

(2) (1888) I.L.R., 11 All., 183.

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person as evidence, but to administer to such person either an oath or an affirmation as the case may require, and reference was made to the ruling in *Queen-Empress v. Maru* (1), but in this Bench ruling no reference was made to the provisions of section 13 of the Oaths Act, and therefore this ruling can not be taken as an authority on that section. In a later ruling, *Emperor v. Dhanu Ram* (2), a Bench of this Court specifically dissented from the ruling of the single Judge in *Queen-Empress v. Maru* (1), and held as follows, on page 51: "We are unable to hold that the mere fact that the court advisedly refrained from administering the oath renders the statement of the witness inadmissible. In our opinion a court should only examine a child of tender years as a witness after it has satisfied itself that the child is intellectually sufficiently developed to enable it to understand sufficiently what it has seen and to afterwards inform the court thereof. If the court is of opinion that by reason of tender years the child is unable to do this it ought not only to refrain from administering the oath but from examining the child at all. If, on the other hand, the court thinks that the child, though of tender years, is capable of informing the court of what it has seen or heard, it is best that the court should comply with the provisions of section 6 in the case of a child just as in the case of any other witness." In that case the child in question was about six years, that is about the same age as the boy Madan, whose age is given as 6½ years. In the particular ruling no reference was made to the case of *Queen-Empress v. Lal Sahai* (3).

Now the matter has been considered by other High Courts and a Full Bench of the Calcutta High Court in the case of *Queen v. Sewa Bhogta* (4) held that section 13 of the Oaths Act would cover any omission, whether intentional or otherwise. In this case four learned

(1) (1888) I.L.R., 10 All., 207.

(3) (1888) I.L.R., 11 All., 183.

(2) (1915) I.L.R., 38 All., 49.

(4) (1874) 23 W.R. (Cr. R.), 12.

Judges were in favour of this view and the remaining learned Judge, Mr. Justice JACKSON, held the opposite view. In the case of *Queen-Empress v. Viraperumal* (1) there was a difference of opinion between the learned CHIEF JUSTICE who held that section 13 would not cure the defect and Mr. Justice PARKER, who held that it would cure the defect. In the case of *Fatu Santal v. King-Emperor* (2) a Bench of the Patna High Court held that section 13 would cure the defect, and that was also held in the case of *Hussain Khan v. The Crown* (3).

There is, therefore, a great preponderance of opinion in favour of the view that section 13 of the Qaths Act does cure a defect such as in the present case where there was not an accidental omission but an intentional omission to administer the oath. I consider this view is the correct one and I agree with the quotation which I have made from the case of *Emperor v. Dhanu Ram* (4). I may note that in the present case the learned Sessions Judge applied the criterion of English law as to whether the child understood the nature of an oath. In Powell's Law of Evidence, 1921 edition, page 187, it is stated that a child of tender years who does not in the opinion of the court understand the nature of an oath may now give unsworn testimony in all proceedings for any criminal offence if in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and to understand the duty of speaking the truth, but an accused person cannot be convicted unless the evidence of the child is corroborated in some material particular implicating the accused. This provision comes from the statute of the Children Act, 1908, 8 Edw. 7, ch. 67, section 30. We consider that this provision of the English law is sounder than the provision of the Indian

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(1) (1892) I.L.R., 16 Mad., 105.

(2) A.I.R., 1921 Pat., 109.

(3) A.I.R., 1923 Lah., 332.

(4) (1915) I.L.R., 38 All., 49.

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law in two respects. In the first place it makes provision for a child who may not understand the meaning of an oath but may be able to give intelligent replies, and in the second place it makes the provision that the evidence of the child requires corroboration. In my opinion it would be well if the Indian Evidence Act and the Oaths Act were amended in this particular and if it were not left to the courts to apply section 13 of the Oaths Act in this connection.

The next point on which arguments centred was in regard to the provisions of section 423 of the Criminal Procedure Code, which prescribes in sub-section (1)(b) for an appellate court that the appellate court may "in an appeal from a conviction, (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be re-tried by a court of competent jurisdiction subordinate to such appellate court or committed for trial, or . . . " Now learned counsel for the accused has argued at considerable length that what the appellate court is empowered to do by the second alternative in this sub-section is only to direct a Magistrate to hold an inquiry under chapter XVIII of the Criminal Procedure Code, and he argues that in the present case as the Magistrate merely made a formal order of commitment the provisions of section 423 have not been carried out, and he says that the duty of the Magistrate was to re-summon all the witnesses for the prosecution and hear their evidence again in the presence of the accused and have them cross-examined and have the statement of the accused taken and after that draw up a charge sheet under section 210 and carry out the procedure laid down in sections 211, 212 and 213; whereas in the present case all that the Magistrate did after receiving the order of the Sessions Judge was to amend the charge and call on the accused to give a list of witnesses and make a formal order of commitment. Now learned counsel relies on a ruling of a learned single Judge of

this Court in *Emperor v. Maula Khan* (1). In that case an accused person had been sentenced by a Magistrate, and the learned Sessions Judge committed the accused to his own court and tried and convicted him. The learned single Judge of this Court held that under section 193 of the Code of Criminal Procedure no court of session shall take cognizance of any offence unless the case has been committed by a Magistrate duly empowered, and section 477 was the only section which authorised a court of session to commit the accused person to itself, and under section 423 of the Criminal Procedure Code a court of appeal may order an accused person to be committed for trial, that it was clear that what the section means is that the court of appeal can direct the Magistrate competent to make a commitment to commit the accused to the court of session for trial, and that the learned Judge was in error in thinking that he had a power to make a commitment to his own court. The ruling does not support the proposition of learned counsel because it is nowhere laid down in the ruling that when the Magistrate is directed to commit the accused to the court of session for trial, the Magistrate is required to make inquiry under chapter XVIII of the Criminal Procedure Code and to re-summon and re-hear the witnesses for the prosecution and take the statement of the accused again. Learned counsel in fact has not produced any ruling whatever in which such a procedure is laid down. His argument however is that when a Magistrate has been ordered to commit an accused person for trial, the Magistrate can only act under chapter XVIII of the Criminal Procedure Code and if he acts under that chapter he must therefore hold an inquiry. We consider that this is a very narrow view to take and that the particular view of the learned counsel for the accused would lead to great difficulties and would be prejudicial to accused persons. On this

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(1) Weekly Notes 1907, p. 178.



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view, if an appellate court directs that a commitment should be made it would give the prosecution an opportunity to call fresh witnesses who had not been produced before. Such a matter would be definitely to the disadvantage of an accused person. It would also lead to the conclusion that although the appellate court had ordered that the accused should be committed for trial, the Magistrate would have jurisdiction to decide whether the accused person should be committed for trial or not, and, if he thought fit, to disregard the order of the appellate court and discharge the accused person. I consider that there is nothing whatever in the language of section 423 to warrant the view which has been taken by learned counsel. There has been some difference of opinion in different rulings as to whether the language in section 423 which we have quoted means that the actual order for commitment is the order passed by the sessions court or whether it means that the appellate court directs the Magistrate to pass an order of commitment under section 213. In *Sessions Judge of Mangalore v. Malinga* (1), *Queen-Empress v. Krishnabhat* (2), and *In the matter of Kalagava Bapiiah* (3) this matter has been considered. Those courts have come to the conclusion that the appellate court may order the commitment itself, and in *Sessions Judge of Mangalore v. Malinga* (1) it was held that both the courses are open to the appellate court. In *Hasan Raza v. Emperor* (4) a learned single Judge of this Court made an order that the commitment should be to the sessions court and apparently he intended that there should be no intervention by a Magistrate. In *Queen-Empress v. Maula Bakhsh* (5) a Bench of this Court on page 207 used language which can be read as intending that the order of the appellate court is sufficient without the intervention of a Magistrate, and this can also be deduced

(1) (1907) I.L.R. 31 Mad., 40.

(2) (1885) I.L.R. 10 Bom., 319.

(3) (1903) I.L.R. 27 Mad., 54.

(4) (1922) 20 A.L.J., 568.

(5) (1893) I.L.R., 15 All., 205.

from the ruling of a Bench in *Emperor v. Mohan Lal* (1). I think that this point is of no great importance, and I consider that both courses are legal, that is, that the appellate court under section 423 may either itself commit the accused for trial before the sessions court or it may direct a Magistrate to do so. But where it adopts the latter course, it does not give the Magistrate any jurisdiction to make any further inquiry and that the inquiry already held is sufficient for the purposes of chapter XVIII. Some difficulty, however, arises from the provisions in section 291 of the Criminal Procedure Code that the accused shall be allowed at the trial to examine any witness not previously named by him, if such witness is in attendance, but he shall not, except as provided in sections 211 and 231, be entitled of right to have any witness summoned other than the witnesses named in the list delivered to the Magistrate by whom he was committed for trial. Section 231, which allows further witnesses, only applies in those cases where there has been an alteration of the charge after the announcement of the charge. It is important therefore that the right of the accused to give the list of witnesses under section 211 should be maintained in the case we are considering. It is therefore more convenient if an appellate court adopts the course of directing a Magistrate to make an order of commitment. The Magistrate then frames a charge or amends the charge under section 210, Criminal Procedure Code, and under section 211 requires the accused to give in his list of witnesses and the Magistrate makes a formal order of commitment, similar to the order in the present case, under section 213. I consider that the course adopted in the present case is therefore most convenient for the ends of justice and there is nothing whatever in that course which is irregular.

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(1) (1915) 13 A.L.J., 477.

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The next point which was argued was in regard to the statement of the accused. The Magistrate had originally taken the statement of the accused and at the trial the Assistant Sessions Judge took the statement of the accused at the close of the prosecution in the usual way. The case was argued and the opinions of the assessors were taken and all the assessors stated that they considered that the accused was not guilty. This was on the 12th of September, 1934. A date was then fixed for judgment, the 25th of September, and on that date the accused appeared before the court and the following order was recorded: "Today is the date for the pronouncement of judgment in this case. The accused is present. On being enquired he told that the hurt observed by the Civil Surgeon on his male organ was due to the fact that he was kept in the kotwali in the night and there the police people had handled it and during that it might have got hurt by the nails of the fingers of those people. 'I did not tell this to the Civil Surgeon, as he did not ask me about it. I did not mention this fact up till now'." The trial court stated in its judgment: "Before taking up the defence I shall further like to note that today I had asked the accused how he got the hurt on his male organ and he replied that he was kept by the police in the kotwali and there they had handled it and thus got scratches by their finger-nails. This explanation was never put forward by the accused up till now. It was no doubt suggested during argument by his advocates but I am not ready to believe it", and the court rejected it. A point was taken about this in appeal, when the learned Sessions Judge stated that the further statement of the accused can and should be disregarded, and that the accused was not prejudiced thereby; that after all it was an irregularity which cannot vitiate the trial. The point is now brought forward that the statement should not have been taken after the assessors had given their

opinions and it is argued that the language in section 342 that the court may *at any stage* of any inquiry or trial put the questions to the accused to enable him to explain any circumstance appearing in the evidence against him would not cover the action of the trial court. I do not express an opinion on this point, but I consider that the accused cannot have been prejudiced in the present case, because, for one thing, all the assessors had brought in a finding of not guilty and, for another thing, the appellate court has specifically stated that it did not take this statement into consideration. The accused cannot therefore in any way in my opinion have been prejudiced by the procedure, if the procedure did in fact amount to any irregularity. An objection was taken that the Chemical Examiner's report was not placed before the trial court but was taken on record by the appellate court. This allegation however is incorrect, because the record shows that the report of the Chemical Examiner was placed on the record by the Magistrate and has remained on the record ever since. Some objection was then taken that the Magistrate had not placed a certificate on the evidence of the medical witness. Presumably he did not do so, because he was not the Magistrate who committed the accused for trial to the court of session. Therefore it was not necessary to do so. This defect was cured by calling the Magistrate as a witness under section 428 to the appellate court. In no way was the accused prejudiced by this procedure.

No other point was raised in this criminal revision. The sentence and conviction appear to be correct.

SULAIMAN, C.J.:—I agree. The first question is whether the omission to administer oath to the child made his statement legally inadmissible and accordingly the trial is vitiated. There is certainly a distinction between a person not understanding questions put to him or being prevented from giving rational answers

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to questions by reason of his tender years and a person not realising the significance of an oath and his obligation to state the truth and liability for speaking falsehood. So far as the Indian Acts are concerned, section 5 of the Oaths Act makes it obligatory upon all persons who may be lawfully examined or may give evidence to take the oath or solemn affirmation; and section 118 of the Indian Evidence Act makes only such persons competent to testify who are not prevented from understanding questions put to them and from giving rational answers to those questions by reason of tender years, etc. Now even though a child may be sufficiently grown up so as to be able to understand questions put to him and to give rational answers to such questions, although he is of tender years, he may nevertheless be so young as not to be capable of realising the significance of the oath and his liability for it. As a matter of fact a child under seven years of age would not be liable criminally even if he spoke an untruth. It would, therefore, seem to follow that in India even children must be made to take oath. If they are unable to understand the questions put to them or to give rational answers to questions, then there would be no point in questioning them at all and taking their statements. On the other hand, if they are competent to do this, then it is obligatory on courts to administer oath to them.

The question whether section 13 would cure the defect in every case is not free from difficulty. The preponderance of authority now is certainly in favour of the view that even an intentional omission to take oath or make affirmation would be cured by this section. The word "omission" is certainly wide enough to include a case where the witness has not taken the oath either due to any accidental omission which may be unintentional or even where the omission is intentional; but I should like to guard myself against being under-

stood to hold that even in an extreme case, which is not likely to happen, where a court defies the law, and, knowing that the law requires that an oath should be given and that it is his duty to administer oath or to make an adult witness affirm it, deliberately omits to ask him to do so or prevents the witness from taking oath, the defect is cured and a record of his verbal statement is legal evidence. In such a case it may be difficult to say that the act was a mere omission within the meaning of section 13 and was not something more than a mere omission. Again there may be a case where parties in a civil suit agree to abide by the statement on oath of a referee or a witness, in which case it could hardly be contended that an omission to administer oath to the referee would be cured by section 13 of the Indian Oaths Act. But where the court acting in good faith and possibly under some error of law considers that the oath in the circumstances is not necessary, I agree that there would be an omission within the meaning of section 13.

In the present case the court in not administering oath to the child took great care to note on the document on which his statement was recorded that the child was of such tender years that in the opinion of the court he was not capable of realising the significance of an oath and it was on that ground only that the court considered it useless and futile to ask him to take an oath.

Even where oath has not been administered to a child and his testimony cannot be legal evidence, there may be cases where the fact that he identified the accused consistently from the time soon after the occurrence till his appearance in court may perhaps be some corroborative evidence and admissible on that ground.

As to the other question, section 423 of the Criminal Procedure Code as worded undoubtedly allows both courses to be adopted by a court of appeal. In an appeal from a conviction, the appellate court not only

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may reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a court of competent jurisdiction subordinate to such appellate court, but may also "order him to be committed for trial". The words "order him to be" must necessarily be construed to be understood before the words "committed for trial". It is clear that the section does not require that the appellate court should "order the Magistrate to commit the accused for trial" but what it requires is that it should "order the accused to be committed for trial". The section is silent as to the court which should commit the accused. It should, therefore, follow that it is open to the appellate court either to commit the accused for trial to the sessions court itself or to order a Magistrate to commit him for trial.

Section 437 which deals with cases exclusively triable by the court of session also contains the same words and empowers a Sessions Judge or a District Magistrate, instead of directing a fresh inquiry, to "order the accused to be committed for trial". Although cases triable exclusively by the sessions court are different in some respects, there is no doubt that under section 437 it would be open to a District Magistrate to commit the accused for trial to the sessions court direct without reference to a Magistrate from whose order he was hearing the appeal. The same words occur in section 423 and must therefore have the same meaning.

There are some difficulties no doubt caused by the language of some of the sections in chapter XXIII. for example, sections 287, 288, 291, etc. where the words "committing Magistrate" are used. In cases where the Sessions Judge commits the accused for trial direct we would have to substitute the words "Sessions Judge" in place of a "committing Magistrate" in many sections of chapter XXIII, which would certainly create a certain amount of awkwardness. But as has been

pointed out by my learned brother, before 1923 there was a provision in section 477 of the Criminal Procedure Code under which a Sessions Judge could commit an accused person for trial direct without reference to any subordinate Magistrate and the same difficulties had to be got over even under the unamended Code.

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The contention urged on behalf of the accused, that in cases where the Sessions Judge directs the Magistrate to commit the accused to trial the proceedings before the Magistrate are governed by chapter XVIII of the Code and accordingly it is obligatory on the Magistrate to follow the provisions of all the sections in that chapter, has in my opinion no force. Where in the case of an appeal the appellate court is of the opinion that the accused should not be acquitted straight off and is also of the opinion that the case was a fit one to be tried by a sessions court so that a more adequate sentence may be passed on the accused, it is empowered to commit the accused for trial. When such an order is passed, the Sessions Judge has already considered that there are sufficient grounds for committing the accused for trial. It may be that the Magistrate who first tried him was of a different opinion, but his opinion must be deemed to have been superseded by the appellate court, and therefore the opinion of the latter court must prevail. It follows that it should no longer be open to the Magistrate to go back upon this order and decide for himself whether the accused should or should not be committed for trial. I do not think that it could ever have been the intention of the legislature that even where an appellate court has ordered that the accused should be committed for trial, it would still be open to the Magistrate to overrule the appellate court and discharge the accused. It, therefore, follows necessarily that when an order by the appellate court has been passed, the only course open to the Magistrate is to proceed under section 210 to frame the charge and under section 211 to take the list of



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witnesses and even take witnesses for the accused under section 212, but not to discharge the accused but only to commit him for trial by the court of session under section 213. The rest of the procedure relating to the issue of summonses for the witnesses for defence, for demanding bonds by complainants and witnesses, the detention in custody of the complainant or witnesses in case of refusal to execute the bond, notifications, etc. have to be followed as laid down in the sections following section 213. This undoubtedly would be a more practicable and convenient course and would in most cases save the time of the sessions court which would otherwise have to be spent unnecessarily if the commitment were made by the Sessions Judge to the court of session direct.

BY THE COURT:—The revision is dismissed. The accused must surrender to his bail.

#### APPELLATE CIVIL.

*Before Mr. Justice Bennet and Mr. Justice Allsop*

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ROSHAN LAL GESWALA (PLAINTIFF) v. DISTRICT BOARD,  
 ALIGARH AND ANOTHER (DEFENDANTS)\*

*Public servant—Tenure of office—Dismissal at pleasure—Cause of action—Right of suit—Master and servant—Secretary of District Board—Statute prescribing mode of dismissal not complied with—Suit not maintainable—Remedy by appeal to Local Government—District Boards Act (Local Act X of 1922), sections 65, 71, 81, 82—Specific Relief Act (I of 1877), section 42.*

A District Board passed a special resolution abolishing the posts of the Secretary and the Engineer and creating a new combined post of Secretary-Engineer; the services of the Secretary were accordingly dispensed with and the Engineer was appointed to the new post; the Secretary, however, received his salary for the next four months. The resolution was not one passed by such a majority as is laid down by section 71

\*Second Appeal No. 1300 of 1934, from a decree of Ganga Nath, District Judge of Aligarh, dated the 20th of April, 1934, reversing a decree of Yudhishtir Singh Gahlout, Munsif of Koil, dated the 11th of December, 1933.

of the District Boards Act. The ex-Secretary brought a suit against the District Board and the Secretary of State for a declaration that the resolution was void and his dismissal wrongful, and for damages:

*Held* that the suit was not maintainable. A District Board servant is under the general disability of other public servants in that he holds his office "during pleasure", and he can not sue the District Board or the Secretary of State in a court of law for wrongful dismissal; nor can he sue for a declaration that the resolution removing him is null and void, as such a declaration would not come within the scope of section 42 of the Specific Relief Act nor could it lead up to any consequential relief which the court would be competent to grant.

According to section 89 of the District Boards Act, 1922, the Secretary is a public servant; and section 71 entitles a Board to dismiss its Secretary at pleasure. He holds office during the pleasure of the Board, just as any other public servant of the Crown in India holds office during His Majesty's pleasure. The provisions of section 71, regarding the kind of resolution and the extent of majority by which a Board can dismiss its Secretary, are merely the prescribed mode of expression of the pleasure of the Board; the dismissal is yet a dismissal at pleasure, because no cause for dismissal has to be assigned.

Any irregularities or non-compliance with rules in connection with the order of dismissal of a public servant, whose office is terminable at pleasure, would not give him a cause of action or right of suit in a court of law, either for damages or specific performance or an injunction. The only remedy of the plaintiff would be to appeal to the Local Government, as provided by section 82 of the District Boards Act. The powers of the Board are exercised subject to the general control of the Local Government, and it is for the Local Government in its discretion to compel the Board to exercise those powers in a proper manner.

If the plaintiff's claim to damages was based upon a contract, then by section 65 of the District Boards Act it would have to be a written contract in order to be binding on the Board; moreover, it would have to contain an express term against the power of dismissal at pleasure; there was no such contract in the present case. A resolution of the Board appointing a Secretary can not take the place of a written contract; moreover, the resolution does not set out any conditions of the service and of its termination.

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As regards the general law of master and servant, even if the plaintiff did come under it, all that he would be entitled to claim would be reasonable notice or salary in lieu thereof; the four months' pay received by him would be ample in lieu of notice.

[*Per* BENNET, J.—The resolution terminating the plaintiff's services was not one of dismissal, and therefore the procedure prescribed by section 71 was not necessary: the resolution was one of combination of two offices and the appointment of one person to discharge the duties of both offices, under section 81.]

[*Per* ALLSOP, J.—The resolution amounted to an order of dismissal, within the scope of section 71. The Secretary was dismissed, as a necessary consequence of the combination of the two offices, which were to be held by the Engineer.]

Messrs. *M. L. Chaturvedi* and *Kamta Prasad*, for the appellant.

Appeal was heard *ex parte* under order XLI, rule 11.

BENNET, J.:—This is a second appeal by a plaintiff whose suit has been dismissed by the lower appellate court. The plaintiff was employed as Secretary of the defendant District Board, and he claims for a declaration that the resolution of the 16th of October, 1932, is void and that he has been wrongfully dismissed and that he is entitled to damages for wrongful dismissal, and he claims a large sum as damages made up of salary and leave allowances, etc. which he would have received. The lower court finds that after his services were terminated by a resolution of the Board abolishing the post of Secretary and the post of Engineer and creating a combined post of Secretary-Engineer, he received four months' pay.

The first question which arises is whether the appellant has any right of suit. As an abstract proposition of law such a right might arise in one of two ways; either by contract between the parties fixing the terms of service of the plaintiff, or by statute fixing the terms of service of the plaintiff and giving the plaintiff a right to sue.

The relief of damages claimed appears to be a claim under section 73 of the Contract Act, "compensation for

loss or damage caused by a breach of contract". The relations between the parties are those arising from the contract to serve the District Board for the payment of a monthly salary. Now in the different Acts in India for local bodies there are provisions for the manner in which contracts must be made. For District Boards in the United Provinces it is provided in the United Provinces District Boards Act, Act X of 1922, section 65: "(1) Every contract made by or on behalf of a Board whereof the value or the amount exceeds Rs.100 shall be in writing. (2) Every such contract shall be signed (a) by the Chairman or a Vice-Chairman and by the Secretary, or (b) by any person or persons empowered under subsection (2) or (3) of the previous section to sanction the contract if further and in like manner empowered in this behalf by the Board. (3) If a contract to which the foregoing provisions of this section apply is executed otherwise than in conformity therewith, it shall not be binding on the Board."

The plaintiff has not based his suit on any such contract nor has he produced any such contract in court. Section 91 of the Evidence Act provides that "in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof . . . of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible". (It is true that exception 1 makes provision for a public officer required by law to be appointed in writing, but that is clearly for the purpose of proving merely that he was such public officer, and not for proving the terms of his contract of employment.)

The relations between the parties being those of contract and the value or amount exceeding Rs.100, the contract is one to which section 65 of the District Boards Act would apply. To succeed in the present suit the plaintiff would have to produce a contract in writing.

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signed in the manner prescribed and containing the terms in regard to salary, leave allowances, period of service and termination of service, on which his claim is based. In particular his counsel argues that the Board has no right to terminate his service by mere notice without assigning cause. That is a general right existing in a master under the law of master and servant, and in a case based on contract the plaintiff would have to show that the contract contained a term by which the master gave up such a right.

Learned counsel relied on section 70 of the District Boards Act which provides: "(1) Every Board shall by special resolution appoint a Secretary who shall be a whole-time salaried officer. (2) The appointment of the Secretary and the conditions of his service shall be made in conformity with the rules framed by the Local Government." In its present form this section is derived from section 9 of the District Boards (Amendment) Act, Act I of 1930. Learned counsel does not show any rule of the Local Government which required that the conditions of service of the Secretary of a District Board should be in the form of a contract under section 65. The rules therefore do not make the provision which would give the Secretary a right to sue the Board for breach of the conditions of his service. The rules contemplate that the remedy of the Secretary is by way of appeal to the Local Government; and if this were not provided by the rules, the right of appeal would lie under section 82 of the Act to the Local Government.

Section 65(3) clearly provides that if a contract to which the section applies is executed otherwise than in conformity therewith, it shall not be binding on the Board. A mere resolution of the Board appointing a Secretary, though it is in writing and signed by the Chairman and by the Secretary—apparently an acting Secretary—, would not amount to such a contract: because the conditions of service would not be set out

in the resolution, and because the Act draws a distinction between resolutions and contracts. Section 65 lays down where contracts in writing are required. Section 64 lays down certain cases where such written contracts are not sufficient, and where the sanction of a resolution of the Board is also necessary. Therefore a resolution does not dispense with the necessity of a contract in writing under section 65, without which a Board is not bound in law. The provisions of the law in regard to such matters have been strictly enforced by this High Court in *Radha Krishna Das v. Municipal Board of Benares* (1): "Where a contract with a Municipal Board, which, according to section 40 of Act XV of 1883 and section 47 of Local Act I of 1900 must be executed in a particular form, has not been so executed, no suit can be maintained against the Municipal Board in respect thereof, notwithstanding that there has been part performance of the contract and the plaintiff is claiming merely for the value of work done and of material supplied." This ruling followed *Young and Co. v. Mayor, etc. of Royal Leamington Spa* (2) and *British Insulated Wire Company v. Prescott Urban District Council* (3). See also *Raman Chetti v. Municipal Council of Kumbakonam* (4) and *Abaji Sitaram v. Trimbak Municipality* (5). From these considerations it is clear that the plaintiff has not produced any contract which would give him a right to sue in the present case.

The learned counsel for appellant argued that under statute the plaintiff was entitled to a decree. He referred to section 70 of the United Provinces District Boards Act, 1922, as amended in 1930, and to section 71, which provides: "A Board may by special resolution punish or dismiss its Secretary, provided (a) that such resolution is passed by a vote of not less than two-thirds of the total number of members of the Board for the

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(1) (1905) I.L.R., 27 All., 592.

(2) (1883) I.L.R., 8 A.C., 517.

(3) [1895] 2 Q.B., 463.

(4) (1907) I.L.R., 30 Mad., 290.

(5) (1903) I.L.R., 28 Bom., 66.

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time being, or (b) that it is passed by a vote of not less than one-half of the total number of such members and is sanctioned by the Local Government." He argued that the procedure of section 71 had not been followed. That is so; but the Board does not claim that the Secretary was dismissed, and the resolution is not one of dismissal, but of abolition of the office of Secretary and the office of Engineer and the combination of the two offices. Section 81 provides: "Subject to the provisions of this Act or of any rule a Board may appoint one person to discharge the duties of any two or more offices." Counsel argues that section 70(1) provides that the Secretary shall be a whole-time officer, and that therefore his office shall not be combined with that of Engineer or any other office. This interpretation is not that given in Aiyangar's Law of Municipal Corporations in British India, edition 1924, page 126: "The term 'whole-time' officer is used in contradistinction to 'part-time' officer. If a whole-time officer chooses to undertake some work which may be profitable to him financially or otherwise, in his spare time, then, provided it does not render him less efficient for the performance of the duties of his whole-time office he does not break this condition of his appointment." The meaning of whole-time officer is one who gives all his time to the service of the Board, and an officer who did so would be a whole-time officer even though part of his time was spent in doing the work of Secretary and part in doing the work of Engineer. Section 70 does not say that the Secretary shall be a whole-time Secretary, but that he shall be a whole-time salaried officer. The argument of counsel is that the District Boards Act and rules make provision for the appointment, conditions of service, and dismissal of the Secretary, and that under one of those rules laid down in a Government letter removal should also be under section 71, and he claims that the plaintiff has a right to receive damages because his service has been

terminated otherwise than by dismissal under section 71 in the manner laid down by that section. The assumption by counsel is that plaintiff had a right to hold his office *during good behaviour*. It is true that in certain parts of the British Dominions such provision has been made by statute. But there is no such provision in the District Boards Act, 1922, or in any similar Act in India, or for public or Government servants in India. Under section 89 it is provided: "Every officer or servant of a Board shall be deemed to be a public servant within the meaning of the Indian Penal Code; and in the definition of 'legal remuneration' in section 161 of that Code, the word 'Government' shall, for the purposes of this section, be deemed to include a Board."

The preamble states: "An Act to make better provision for Local Self-Government in rural areas of the United Provinces. Whereas it is expedient to make better provision for Local Self-Government, etc."

Government of India Act, 1919, section 96B(1) provides: "Subject to the provisions of this Act and of rules made thereunder, every person in the civil service of the Crown in India holds office *during His Majesty's pleasure* . . ." This then is the general provision for all Government servants in India, that they hold office during His Majesty's pleasure, and not "during good behaviour". The District Boards Act, 1922, does not contain any provision that a different rule was to be set up for servants of District Boards from the general rule for all Government servants. The situation is well expressed in Aiyangar, *Law of Municipal Corporations in British India*, pages 124, 125:

"All offices are held either 'at pleasure' or 'during good behaviour'. Where an office is held at pleasure, the holder thereof is subject to dismissal at any time without any cause being assigned. No notice or framing of any charge is necessary; and the holder is removable at the sole discretion of the appointing authority. Where, however, an office is held during good behaviour, the holder thereof is appointed to all intents

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and purposes for life and has what is called a freehold office, for his life. He can be removed from office only for want of good behaviour. In this case, notice of dismissal should be given and a charge framed and proved.

"It is well known that except where it is otherwise provided by statute, all public officers and servants of the Crown hold their appointments at the pleasure of the Crown; and speaking generally, they are subject to dismissal at any time without cause assigned; and an action for wrongful dismissal will not be entertained by a court of law.

"All officers and servants of local bodies do hold public offices and are expressly stated to be public servants by the several Acts creating the said local bodies. The Acts contain express provisions regarding their appointment and dismissal. Except where a particular appointment is stated to be held during good behaviour, all officers and servants of local bodies would, according to the true intent and meaning and the legal construction of the enactments, hold their respective offices only at pleasure. They are accordingly removable from their office without any notice being given and without any cause being assigned. They would be exactly in the same position as the officers and servants of the Crown . . .

"Most, if not all, of the local bodies have made rules and regulations relating to the grant of pensions, gratuities, etc. These rules and regulations generally do not constitute a contract between the parties . . . If the rules are not complied with, the remedy of the party concerned is not by a law suit but by way of appeal departmentally to higher authorities. He can not have a right of action in a court of law for wrongful dismissal against the local body concerned."

The authorities for this passage are contained in: *Shenton v. Smith* (1), *Wright v. Marquis of Zetland* (2), *Tiruwambala Desikar v. Manikkavachaka Desikar* (3), *Ramdas Hajra v. Secretary of State* (4), *Smyth v. Latham* (5), *Notley v. London County Council* (6), *Chellam Aiyar v. Corporation of Madras* (7), *Meek v. Port of London Authority* (8), *Hales v. The King* (9) and *Leaman v. The King* (10).

(1) [1895] A.C., 229.

(3) [1915] I.L.R., 40 Mad., 177.

(5) [1898] 9 Bing., 692.

(7) [1917] 42 Indian Cases, 513.

(9) [1918] W. N., 102.

(2) [1908] 1 K.B., 63.

(4) [1912] 17 C.L.J., 75.

(6) [1915] 3 K.B., 580.

(8) [1918] 82 J.P., 225.

(10) [1920] 3 K.B., 663.

*Shenton v. Smith* (1) is a ruling by their Lordships of the Privy Council on appeal from the Supreme Court of Western Australia. Dr. Smith was appointed by Government to act as medical officer during a definite period—the absence of a Dr. Rogers on leave. After he had been so acting for over a year an order was passed by the Governor on July 9, 1888, that his tenure of office would cease at the end of the year. This was in consequence of blame attached to him at a coroner's inquest. He presented a petition of right making the Colonial Secretary the defendant, and the jury found that the plaintiff was led to believe that he would hold the office during good behaviour as long as the office existed; and that Government had not given reasonable notice, and had no reasonable cause to dismiss him, and they assessed damages at £200. In appeal the two Judges of the Supreme Court differed on the questions of law. On appeal by the defendant to the Privy Council, the arguments for the plaintiff were similar to those in the present case before us. It was argued that

"The Civil Service Regulations contained provisions as to the procedure to be adopted by the Governor in case he desires to suspend or dismiss an officer from his office. The published regulations must be deemed to have formed part of the contract between the Crown and the respondent, and he could only be lawfully dismissed in accordance with the procedure prescribed thereby. This case ought to be treated on the same footing as if it were a question between subject and subject, being between a Local Government and a subject. The Colonial Government is not the Crown, and dealt with the respondent on the same footing as a private corporation. It does not possess the immunities of the Crown, nor has it the same discretionary power of dismissing public servants."

Their Lordships did not accept these arguments; they held that a Colonial Government is on the same footing as the Home Government as to the employment and

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dismissal of public servants, and held that Dr. Smith had no right to sue. On pages 234 and 235 it was stated:

"They consider that, unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown: not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly, his remedy is not by a law suit, but by an appeal of an official or political kind. Dr. Smith did in fact make such an official appeal to the Secretary of State. . . . As for the regulations, their Lordships again agree with STONE, J., that they are merely directions given by the Crown to the Governments of Crown Colonies for general guidance, and that they do not constitute a contract between the Crown and its servants. . . . They are alterable from time to time without any assent on the part of Government servants, which could not be done if they were part of a contract with those servants. . . . The difficulty of dismissing servants whose continuance in office is detrimental to the State would, if it were necessary to prove some offence to the satisfaction of a jury, be such as seriously to impede the working of the public service. No authority, legal or constitutional, has been produced to countenance the doctrine that persons taking service with a Colonial Government to whom the regulations have been addressed, can insist upon holding office till removed according to the process thereby laid down. Any Government which departs from the regulations is amenable, not to the servant dismissed, but to its own official superiors, to whom it may be able to justify its action in any particular case."

That the same principle applies to Local Self-Government bodies is shown by *Notley v. London County Council* (1). The plaintiff brought an action in the King's Bench Division claiming a declaration that a resolution of the defendants purporting to dismiss the plaintiff from his office of district surveyor was illegal and void and that plaintiff was entitled to hold the said office notwithstanding the resolution, and claiming an injunction against the defendants. The plaintiff had held the office from 1875 to 1915. The plaintiff argued:

(1) [1915] 3 K.B., 580.

that the power to dismiss must be exercised judicially and reasonably and not arbitrarily; that district surveyors had judicial functions and were not servants of the defendants though appointed by them. It was held that under section 32 of the Metropolitan Buildings Act, 1855, the defendants may "by order, at their discretion, dismiss or suspend any future district surveyor". At page 584 it was laid down: "In my judgment the words perfectly clearly denote and describe an office held at the pleasure of this body . . . Of course, if there were anything in the Act of 1855 beyond the words I have referred to which pointed to some tenure, such as a freehold tenure or tenure *dum se bene gesserit*, or subject to any notice, or anything of that kind, I should very readily construe the words 'at their discretion' etc. and 'may dismiss' as being subject to those terms and should hold that the defendants were, in exercising their discretion, to carry and work out that tenure and give effect to it . . . I must hold that this action fails because the County Council have power to terminate this gentleman's tenure of his office at their pleasure."

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The language of the different District Boards Acts may be examined from this point of view. N.-W. P. and Oudh Local Boards Act, Act XIV of 1883, section 34 stated: "(1) Every District Board and every local Board shall, from time to time, appoint one or more of its members, or, with the sanction of the Commissioner of the Division, any other person or persons, to be its Secretary or Secretaries, and may remove any person so appointed."

United Provinces District Boards Act, Local Act III of 1906, stated in section 30: "(1) Every Board shall, from time to time, at a special meeting, appoint one or more of its members, or, with the sanction of the Commissioner, any other person or persons, to be its Secretary or Secretaries." Section 34 stated: "In the absence of a written contract to the contrary, every officer or

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servant employed by a Board shall be entitled to one month's notice before discharge or to one month's wages in lieu thereof, unless he is discharged for misconduct or was engaged for a specified term and discharged at the end of it."

*Bennet, J*

Act X of 1922 provided: "70. Every Board shall by special resolution appoint a Secretary, who shall be a whole-time salaried officer, and prescribe, subject to the provisions of section 85, the salary and other conditions of his appointment." This has been amended by Act I of 1930 to state: "70. (1) Every Board shall by special resolution appoint a Secretary who shall be a whole-time salaried officer. (2) The appointment of the Secretary and the conditions of his service shall be made in conformity with the rules framed by the Local Government." Section 71 states: "A Board may by special resolution punish or dismiss its Secretary, provided (a) that such resolution is passed by a vote of not less than two-thirds of the total number of members of the Board for the time being, or (b) that it is passed by a vote of not less than one-half of the total number of such members and is sanctioned by the Local Government." It is to be noted that this section entitles a Board to dismiss its Secretary at pleasure, and that the Secretary holds his office at pleasure of the Board, just as any other public servant. That no distinction can be drawn between a servant of a Board and other public servants in this respect is shown by the fact that the Secretary of State for India in Council is also made a party to this suit, and as already pointed out section 96B(1) of the Government of India Act, 1919, makes the tenure of every servant of the Crown in India "during His Majesty's pleasure". The only provision made by section 71 is as regards the way in which the right is to be exercised, and there is no limitation of the right to dismiss at pleasure. The lower appellate court finds that the resolution was passed by 19 members out of 21 present, two not voting, and that

the total number of members was 34. If the resolution had been one of dismissal under section 71, the irregularity would have been a matter for the plaintiff to bring to the notice of Government on appeal, as an appeal is allowed by the rules and the Act. But, on the principle of *Shenton v. Smith* (1), where irregularities were found in the dismissal, such irregularities cannot give a right to sue in a court of law. Further the finding of the lower appellate court is that the resolution was not one of dismissal under section 71, but it was a resolution under section 81 which provides: "Subject to the provisions of this Act or of any rule, a Board may appoint one person to discharge the duties of any two or more offices." A resolution under this rule does not require a two-thirds majority of the total number of members. The finding on this point is correct, and there is nothing in the Act to the contrary. The resolution against which the suit is directed is the resolution of October 16, 1932, stating: "The Board resolves that the posts of the Secretary and the Engineer be abolished and a new post designated as Secretary-Engineer be created, on Rs.250—15—350, and the services of both the incumbents be dispensed with owing to the abolition of their posts."

In the District Board Manual, page 279, certain qualifications are necessary for an Engineer. The Secretary therefore could not hold the combined post. The necessary consequence of the resolution was that the service of the Secretary terminated. On page 146 of the Manual there is a rule made by Government: "The removal of a Secretary from the post of Secretary without his written consent is a dismissal within the meaning of section 71 of the Act, whether the Secretary is thereby removed from the Board's service or is transferred to another post in the Board's service." The Secretary has, however, not been removed from the post of Secretary but the post

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itself has been abolished, and the Secretary is not technically qualified to fill the combined post of Secretary-Engineer. Even on the assumption that the case would come under this rule of Government, on the principle of *Shenton v. Smith* (1) irregularities in an order of dismissal do not give a public servant any right to sue in a court of law.

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In *Wright v. Marquis of Zetland* (2) a scheme under the Endowed Schools Act, 1869, provided that the head master of an endowed school might "at pleasure" dismiss all assistant masters in the school. The plaintiff sued for damages for wrongful dismissal without notice. The jury found that by custom assistant masters were entitled to a term's notice of dismissal. The Court of Appeal held that such a custom was excluded by the terms of the scheme, and therefore the plaintiff was not entitled to notice of dismissal, and that in any case the action was not maintainable against the Governors. On page 69 the judgment of the Court of Appeal stated:

"Clause 30 is as follows: 'The Governors may at pleasure dismiss the head master without assigning cause, after six calendar months' written notice given to him in pursuance of a resolution passed at two special meetings held at an interval of not less than fourteen days, such resolution being affirmed at each meeting by not less than two-thirds of the Governors present and voting on the question.' It seems to me that the provision that dismissal at pleasure shall be carried out or expressed by a resolution passed at two special meetings is not inconsistent with dismissal 'at pleasure', any more than if it was said that the dismissal must be in writing or under seal. It is a mere mode of the expression of the pleasure or will of the Governors, without assigning cause, that the head master shall be dismissed."

This ruling shows that even where provisions exist as in section 71 of the District Boards Act that a special resolution and a two-thirds majority are required, the dismissal is still a dismissal "at pleasure" because no cause has to be assigned for the dismissal. And where

(1) [1895] A.C., 229.

(2) [1908] 1 K.B., 63.

the office is held "at pleasure" then on the principle of *Shenton v. Smith* (1) no action will lie for an order of dismissal which is made not in accordance with rules.

In *Ramdas Hajra v. Secretary of State for India* (2) the plaintiff, a clerk in a Collector's office, sued for a declaration that he had been wrongfully dismissed and for arrears of salary. He was prosecuted and acquitted. Without giving him any opportunity to explain or answer the charges, the Collector after his acquittal dismissed him on account of some other facts not elicited at the trial. The judgment of MOOKERJEE, J., on page 78 stated

"I am clearly of opinion that the plaintiff ought to have been heard before he was dismissed from Government service. The Collector wholly misunderstood the scope and effect of the rules on the subject, when he held that as the plaintiff had been prosecuted, he need not be called upon to show cause why he should not be dismissed."

But on page 80 MOOKERJEE, J., held:

"It is now firmly settled that, except where it is otherwise provided by statute as in *Gould v. Stuart* (3), all public officers and servants of the Crown hold their appointments at the pleasure of the Crown: *Dunn v. The Queen* (4); and all, in general, are subject to dismissal at any time without cause assigned: *In re Tufnell* (5), *Young v. Adams* (6), *Ex parte Robertson* (7), *Shenton v. Smith* (1), *Grant v. Secretary of State* (8), and *Dickson v. Combermere* (9), nor will an action for wrongful dismissal be entertained. As Sir William Anson puts it (Law and Custom of the Constitution, volume 2, part I, page 221, third edition, 1907) all offices are held either "at pleasure" or "during good behaviour", and, unless it is otherwise stated, their occupants hold "at pleasure". This principle has been repeatedly recognized in the courts of this country: *Voss v. Secretary of State for India* (10), *King v. Secretary of State for India* (11), and *Jehangir Cursetji v.*

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(1) [1895] A.C., 229.

(3) [1896] A.C., 575.

(5) (1876) 3 Ch. D., 164.

(7) (1858) 11 Moo. P.C.C., 288.

(9) (1863) 3 Fos. and Fin., 527.

(2) (1912) 17 C.L.J., 75.

(4) [1896] 1 Q.B., 116.

(6) [1898] A.C., 469.

(8) (1877) 2 C.P.D., 445.

(10) (1906) I.L.R., 33 Cal., 669.

(11) (1908) 13 C.L.J., 357.



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*Secretary of State for India* (1). It is plain therefore that the plaintiff was liable to dismissal at any time without cause assigned. What the Crown could do independently of any inquiry and without the assignment of any reason cannot very well be questioned in a court of law on the ground that the inquiry has not been satisfactory or in a proper form, or that the reason assigned is unsound or open to criticism. It is thus impossible to hold, as his tenure of office was so precarious, that the plaintiff can successfully claim any relief against the Crown. . . . The plaintiff is not entitled to a declaration that his dismissal has been in contravention of the rules, because it does not fall within the scope of section 42 of the Specific Relief Act, nor can it admittedly lead up to any consequential relief against the Crown which the court is competent to grant. Section 42, as was explained in *Deokali Koer v. Kedar Nath* (2), does not sanction every form of declaration but only a declaration that the plaintiff is entitled to a specific legal character or right as to property."

The reasoning given in this judgment applies to the relief of a declaration asked for by the present plaintiff that the resolution of 16th October, 1932, is void, and such a declaration cannot be granted under section 42 of the Specific Relief Act.

In *Dunn v. The Queen* (3) it was decided that servants of the Crown, civil as well as military, except in special cases where it is otherwise provided by law, hold their offices only during the pleasure of the Crown. Lord ESHER, M.R., quoted a passage from the judgment of Lord WATSON in *De Dohse v. Reg.* (4):

"In the first place it appears to me that no concluded contract is disclosed. . . . ; and in the second place I am of opinion that such a concluded contract, if it had been made, must have been held to have imported into it the condition that the Crown has the power to dismiss. Further, I am of opinion that, if any authority representing the Crown were to exclude such a power by express stipulation that would be a violation of the public policy of the country, and could not derogate from the power of the Crown."

(1) (1902) I.L.R., 27 Bom., 189.  
(3) [1896] 1 Q.B., 116.

(2) (1912) I.L.R., 39 Cal., 704.  
(4) Unreported.

This dictum was followed in *Hales v. The King* (1), where a clerk claimed to have been engaged in the Admiralty subject to a week's notice.

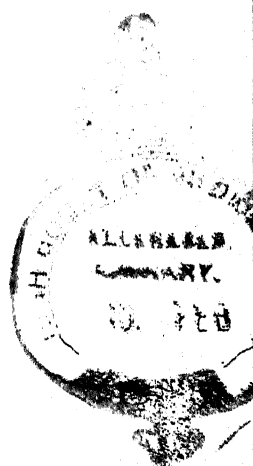
In *Leaman v. The King* (2) plaintiff sued on a contract by petition of right, alleging that he was enlisted in 1914 for one year or the duration of the war at 6s. a day, and received a paybook showing this amount and was so paid till June, 1916, when he was informed that he had in fact enlisted as a "time serving soldier" for seven years at 1s. a day and he was compelled to refund by deduction the excess pay he had drawn since 1914. On discharge in 1920 he brought this petition. He referred to the Manual of Military Law, chapter X, para. 18, page 189, where it is stated: "The enlistment of the soldier is a species of contract between the Sovereign and the soldier, and under the ordinary principles of law cannot be altered without the consent of both parties." On page 668 ACTON, J., held: "... but it by no means follows that it vests in the soldier the right to enforce by proceedings in a court of law the payment of the sums to which he claims to be entitled in respect of his services." It was held that the engagement was voluntary only on the part of the Crown.

Against all this authority, learned counsel for the appellant, after having an interval for research, was only able to cite four rulings which laid down that corporate bodies were not exempt from the jurisdiction of civil courts—a proposition that no one denies—and one ruling relating to a suit by a District Board servant. The four rulings did not deal with cases of servants, but with other matters with which the present suit is not concerned. The solitary ruling relating to a servant is reported in *Sheo Narain v. District Judge, Shahjahanpur* (3) and is by a single Judge, Mr. Justice YOUNG. The circumstances were very similar to the

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(1) (1918) W.N., 102.

(2) [1920] 3 K.B., 663.

(3) A.I.R., 1933 All., 826.

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present case. A District Board (Shahjahanpur) by a resolution dismissed its Secretary, alleging the economic situation and the desirability of amalgamating the offices of the Engineer and the Secretary, and secondly that the Secretary was unsatisfactory, incompetent, and had been creating friction among the members of the Board. Next day the Secretary filed a suit in the court of the Munsif for an injunction restraining the defendants (apparently the District Board) from interfering with the discharge of his duties as Secretary and prohibiting them from illegally discharging him from office. The ruling states:

"I would like to note here that though in the ordinary case of a master and a servant an injunction certainly would not lie restraining a master from dismissing his servant, the remedy of the servant, if he was wrongly dismissed, would be for damages; but in the case of a District Board they are governed by a statute. Under section 71 of the District Boards Act (X of 1922) the Board may punish or dismiss a Secretary subject to the rules made under the authority of the statute by the Local Government. The rules in accordance with the statute have been framed by the Local Government. Rule 3 enacts as follows: 'No officer or servant shall be dismissed without a reasonable opportunity being given to him of being heard in his own defence.' It is clear therefore that it would be open for a dismissed servant to allege that the rule had not been complied with and that therefore he was not legally dismissed from his office. He would then be in a position to ask the court for an injunction."

The ruling proceeds to state that the Munsif issued and withdrew an *interim* injunction, that on appeal the District Judge stayed the order of the Munsif to cancel the *interim* injunction, that the Chairman disobeyed it by appointing the Engineer as Secretary, that the District Judge committed the Chairman and the Engineer to the civil prison for six months for disobedience, and on apologies being given the learned single Judge remitted the imprisonment and fined the Chairman Rs.500 (though order XXXIX, rule 2 does

not authorise fine) and held that the Engineer was not guilty of contempt of court.

Now the ruling of Mr. Justice YOUNG cannot be taken as any authority on the question of whether a suit will lie by a servant of a District Board against the Board, because it apparently never occurred to him or to the learned counsel in that case that any question could arise that the servant of a District Board had no such right. He quotes no authority on the subject nor does he attempt to distinguish between the case of a servant of a District Board and any other public servant. It is true that the judgment recognizes the rule of law that an injunction does not lie to restrain a master from dismissing a servant. But the learned Judge thought that because the Board was governed by a statute and by rules of the Local Government, therefore an injunction could issue. There is nothing to this effect in the Specific Relief Act, Act I of 1877, which provides in section 56(f) that an injunction cannot be issued to prevent the breach of a contract the performance of which would not be specifically enforced, and in section 21(b) that a contract cannot be specifically enforced "which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms." Illustrations to this clause (b) show that the contract of personal service cannot be specifically enforced. In *Nusserwanji Merwanji v. Gordon* (1) it was held that for this reason a court would not decree specific performance of an agreement that plaintiffs should be the agents of a company. In *Sircar and Sons v. Baraboni Coal Concern* (2) it was laid down: "Under sections 21 and 57 of the Specific Relief Act a limited liability company cannot be restrained by injunction from dispensing with the services of managing agents, even

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(1) (1881) I.L.R. 6 Bom., 266.

(2) (1911) 16 C.W.N., 289.

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when the contract of service provides that the managing agents are only to be removed in a specified manner and after a specified period . . . The remedy of the managing agents for dismissal, if wrongful, lies in a suit for damages." The judgment therefore puts the District Board in a worse position than an ordinary master or a limited liability company. It is difficult to see why this should be so, in view of the principle that public servants should be removable at pleasure in the interest of the public, and that they should not have a right to sue for wrongful dismissal. If we examine the rules on page 135 of the United Provinces District Board Manual to which the learned single Judge referred, we find that the rule quoted by him would not apply in the present case because the footnote to rule 3 says "This rule shall not apply to cases in which a Board discharges an officer or servant for some other reason than a fault committed by him."

In the face of the numerous rulings already set out which show that public servants have no right to sue in a court of law for wrongful dismissal, the solitary ruling of a learned single Judge in which the point was not even considered cannot prevail. The fact that Government controls a District Board in these matters is shown by the provision in section 71(b) that where the Secretary is punished or dismissed by special resolution by a vote of not less than one-half of the total number of such members (as in the present case) the sanction of Government is required. If, on the other hand, the case was regarded as one of combination of offices under section 81, then there is the control of the Commissioner over all proceedings of a Board under section 164(d), and the Commissioner could report the matter to Government for orders. There is no doubt that the ultimate authority under the District Boards Act and the rules is the Local Government, and therefore there seems to be no reason to consider that the servant of a District Board holds his position in any way differently

than any other public servant who holds his position "at pleasure". If there had been any intention to create a different tenure, a provision would have been inserted in the Act. The provision in section 71 is not such a provision, and is intended to create a check on the way in which a Board works,—either two-thirds majority of the total number, or one-half and the sanction of the Local Government for the dismissal of a Secretary or his punishment. But the creation of such a check does not give the Secretary a right to sue even if the case came under section 71. It is for the Local Government and not for the courts to see that the Board has acted in accordance with the section in a case coming under the section.

As regards the general law of master and servant, even if the plaintiff did come under it, all that he would be entitled to claim would be reasonable notice or salary in lieu of notice. In the present case the four months' pay received after abolition of his post would be ample in lieu of notice.

The conclusion therefore is: A District Board servant is under the general disability of other public servants in that he holds his office "during pleasure", and he cannot sue the District Board or the Secretary of State in a court of law for wrongful dismissal; nor can he sue for a declaration that a resolution removing him is null and void, as such a declaration would not come under section 42 of the Specific Relief Act.

ALLSOP, J.:—I have had the advantage of seeing the judgment of my learned brother. In my opinion the resolution of the Board amounted to an order of dismissal. The Board is not empowered to abolish the office of Secretary and although it purported to do this, that was not in effect the result of its resolution that there should be a joint office of Secretary and Engineer. Neither the office of Secretary nor the office of Engineer was abolished. The resolution was that the two offices should be held by one person. In order that this

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resolution should be carried into effect, it was necessary that either the Secretary or the Engineer for the time being should be dismissed. The Board dismissed the Secretary and appointed the Engineer to hold both offices.

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The fact that the Secretary was dismissed does not, however, necessarily lead to the inference that he was entitled to institute a suit against the Board. No doubt, the order of dismissal should have been by means of a resolution passed by a majority consisting of two-thirds of the members of the Board, but the question is whether the Secretary can enforce any remedy in a court of law because the resolution was passed by a majority of less than the requisite number of members. I agree with my learned brother that he could not. It is unnecessary for me to reiterate the arguments with which I am in agreement. The powers of the Board are exercised subject to the general control of the Local Government and it is for the Local Government in its discretion to compel the Board to exercise those powers in a proper manner. I do not consider that the provision that a Secretary should be dismissed only by a resolution passed by a certain majority gives the Secretary a right to institute a suit against the Board. He can doubtless appeal to the Local Government if his dismissal is not warranted.

It is difficult to see what cause of action the appellant can possibly have. It is clear that there can be no decree for specific performance of a contract of personal service. There can be no injunction compelling a Board or anybody else to employ a particular person. Indeed, as the learned Judge of the lower appellate court has pointed out, the appellant did not even seek an injunction against the Board. If the appellant is suing for damages on the basis of a contract, the most that he could expect would be salary for a certain period in lieu of notice. It has been found that he received

his salary for a period of four months after his dismissal and that is amply sufficient to compensate him.

The learned Judge of the lower appellate court has also pointed out that the Secretary sought a declaration which could not be in any case granted, because it would have been fruitless. The appellant informed the Chairman of the Board that he accepted the resolution and accordingly he actually gave over charge to his successor and had not been carrying on the duties of Secretary for a considerable period when he instituted the suit. Even if he obtained a declaration, that would not in any way benefit him.

In my opinion there is no force in the appeal and I would dismiss it under order XLI, rule 11.

BY THE COURT:—The second appeal is dismissed under order XLI, rule 11.

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### FULL BENCH

*Before Sir Shah Muhammad Sulaiman, Chief Justice,  
Justice Sir Charles Kendall and Mr. Justice Niamat-ullah*

HAIDAR HUSAIN (PLAINTIFF) v. PURAN MAL AND OTHERS  
(DEFENDANTS)\*

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*Agra Pre-emption Act (Local Act XI of 1922), section 19, proviso—Vendee becoming co-sharer after suit and before decree—Defeasance of plaintiff's suit—Agra Pre-emption (Amendment) Act (Local Act IX of 1929), section 3—Retrospective effect—Interpretation of statutes—Question of substantive right or of procedure.*

During the pendency of a suit to pre-empt a sale to a stranger, the defendant vendee became, by virtue of a deed of gift in his favour, a co-sharer of equal status with the plaintiff. Shortly afterwards the Agra Pre-emption (Amendment) Act (IX of 1929) came into effect, which added the proviso to section 19 of the Agra Pre-emption Act, 1922. Later on, the suit was decreed by the trial court:

\*Second Appeal No 359 of 1932, from a decree of Kedar Nath Mehra, Additional Subordinate Judge of Bulandshahr, dated the 14th of December, 1931, reversing a decree of Rameshbal Dikshit, First Munsif of Bulandshahr, dated the 20th of December, 1930.



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*Held* by the Full Bench (NIAMAT-ULLAH, J., dissenting) that the proviso added to section 19 of the Agra Pre-emption Act by the Amending Act of 1929, which came into force after the deed of gift in favour of the defendant vendee, did not prevent him from defeating the plaintiff's claim by virtue of having obtained that deed of gift prior to the passing of the decree.

The proviso is in the nature of an exception to the general rule which was well established when the Amending Act was passed, and should not, in the absence of any indication in the Act that it was intended to have a retrospective effect, be so construed as to affect retrospectively transactions which had come into existence, or rights which had become vested or had been extinguished, before the passing of that Act.

The right of pre-emption is a right of substitution, a right of preference, and as soon as the position of both parties becomes equal in status the preference disappears and the right of pre-emption is altogether extinguished. Once the plaintiff's right was extinguished upon the defendant's acquisition of the status of a co-sharer by virtue of the deed of gift, it could not be revived by the subsequent passing of the Amendment Act in question. The right of the defendant vendee, who has acquired equal status by a deed of gift, to defeat the plaintiff's right of pre-emption is a substantive right, and not a mere matter of procedure which can be regarded as a plea in defence like the plea of limitation; this substantive right, which vested in him as the result of the deed of gift, could not be affected by the subsequent Act.

It is a well established rule of construction that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards a matter of procedure, unless that effect can not be avoided without doing violence to the language of the enactment. If the new Act touches a right in existence at the passing of the Act, then it should not be held to be applicable to a pending action concerning that right.

[*Per* NIAMAT-ULLAH, J.—There is nothing in the Agra Pre-emption Act which lays down that the pre-emptor's right ceases to exist on the vendee acquiring an equal status during the pendency of the suit; on the contrary there are clear indications, e.g. sections 10, 11 and 20, which show otherwise. The law makes a clear distinction between the extinguishment of a right and a bar to the exercise of it. Section 20 clearly recognizes the existence of the right which accrued under section 11, but bars the enforcement thereof where the vendee acquires

an equal right before the suit; similarly, under section 19 the right of pre-emption is not extinguished by the vendee acquiring an equal right after the institution of the suit, only the exercise of the right is barred.

[If section 19 and its proviso are read together, as they must and not the proviso by itself, it appears that the crucial date is the date of the decree; and as the Amending Act had come into force before the decree came to be passed, the section with the proviso appended must be applied in the present case. The section as a whole is a direction to the court; and if the court finds, when it proposes to pass a decree, that there is a certain rule of law laid down for its guidance, it must give effect to it in passing its decree. No retrospective effect is implied in the court doing so; had the Amending Act come into force after the first court had passed its decree, and the proviso was sought to be applied at the stage of the appeal, it would be a question of giving retrospective effect.]

[Section 19 is so worded as to make the rule therein contained a rule of procedure rather than a rule of substantive law; it does not create any right nor does it extinguish any right. It is a well settled rule of construction that an enactment which provides procedure applies to suits pending at its date.]

Mr. *Shabd Saran*, for the appellant.

Mr. *Chandra Bhan Agarwala*, for the respondents.

SULAIMAN, C.J.:—This case has been referred to the Full Bench on certain observations in some cases, which are not *prima facie* reconcilable.

On the 9th of November, 1928, the defendant, who was a stranger to the mahal, purchased a share in village Sunehra. On the 8th of November, 1929, the plaintiff instituted a suit for pre-emption of that share. At that time the plaintiff was a co-sharer, and the defendant being a stranger, the plaintiff had a preferential right as against him and was entitled to be substituted in his place. On the 6th of February, 1930, the defendant acquired a small share in the same mahal by virtue of a deed of gift and became a co-sharer. The plaintiff challenged this transaction as one of sale, but it has now been held against him that it was, in reality, a transaction of gift and not of sale. On the 15th of February,

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1930, the Amending Act (Act IX of 1929) came into force. On the 20th of December, 1930, the first court decreed the suit, but on appeal the lower appellate court has dismissed it.

The question for consideration before us is whether the amendment of section 19 of the Agra Pre-emption Act, which came into force on the 15th of February, 1930, after the deed of gift in favour of the defendant but before the passing of the first court's decree, prevents the latter from defeating the plaintiff's claim.

In the referring order it has been pointed out that the Amending Act came into force on the 15th of February, 1930, on the date when it was published in the Gazette and not on the 27th of January, 1930, when it received the assent of the Governor-General, because being a Local Act it was governed by section 5 of the U. P. General Clauses Act of 1904, and not by the General Clauses Act (Imperial Act No. X of 1897).

Before the passing of the Agra Pre-emption Act of 1922, the view which invariably prevailed in this Court was that the plaintiff may lose his right of pre-emption in two ways, (1) either by losing his own status as a co-sharer, or (2) by losing his right of pre-emption on account of the defendant acquiring a share in the village and placing himself on the same footing as the plaintiff. See *Ram Gopal v. Piari Lal* (1) and *Bihari Lal v. Mohan Singh* (2).

Under the Agra Pre-emption Act of 1922 also it was held that an acquisition of a share by the defendant in the village destroys the plaintiff's right of pre-emption, although the share is acquired during the pendency of the suit. See the case of *Quadrat-un-nissa Bibi v. Abdul Rashid* (3). The question came up finally for consideration before a Full Bench of this Court in *Ram Saran Das v. Bhagwat Prasad* (4). All the three learned Judges

(1) (1899) I.L.R., 21 All., 441.

(3) (1926) I.L.R., 48 All., 616.

(2) (1920) I.L.R., 42 All., 268.

(4) (1928) I.L.R., 51 All., 411.

came to the conclusion that when a share is acquired by a defendant during the pendency of the suit, section 20 of the Act, as it stood unamended, was inapplicable, but that the case was governed by section 19 of the Pre-emption Act. BOYS, J., on pages 419-420 remarked: "If the law has not been altered, then the plaintiff pre-emptor had no 'subsisting right' at the date of the decree; his right had been defeated by the gift to the vendee prior to the decree. How then can he be said to have lost his 'subsisting right' by anything appearing from the Act?" The learned Judge then went on to remark that he agreed that the legislature did not intend to amend the law and that the plaintiff pre-emptor's subsisting right must be held to have been defeated by the acquisition. KING, J., on page 429 remarked that section 19 defeated the plaintiff's right to a decree, because at the time of the passing of the decree the plaintiff had no subsisting right of pre-emption, inasmuch as the purchaser had by that time acquired a pre-emptive status equal or superior to that of the plaintiff. The learned Judge remarked: "The plaintiff may lose his right in a variety of ways, and one way is by the purchaser's acquisition of an interest which puts him on the same level as the plaintiff in respect of the right of pre-emption." KENDALL, J., agreed with the view expressed by the other learned Judges. There is, therefore, no doubt that the *ratio decidendi* of the judgments in the Full Bench case was that a plaintiff's right of pre-emption is lost either by the plaintiff himself losing his status as a co-sharer or by the plaintiff losing his right of preference and therefore ceasing to have a subsisting right on account of the defendant acquiring a share in the village.

The legislature has amended section 19 of the Agra Pre-emption Act by adding a proviso thereto. The question before us is not whether the section as amended is retrospective, but whether the proviso added to the section is so. It is noteworthy that the proviso has not

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been added to section 20, but has been added to section 19 and is in the nature of an exception, because it is confined to cases of voluntary transfer in favour of a vendee after the institution of a suit for pre-emption, and lays down that such a voluntary transfer shall not defeat any right which the plaintiff had at the date of such institution. It seems to me that the legislature by borrowing the words from the judgments of the learned Judges in the Full Bench case and by adding the proviso to section 19 has, by necessary implication, assumed that the interpretation of section 19 as put by the Full Bench was correct, and that under that section a plaintiff's right of pre-emption can be defeated where a defendant acquires a share in the village during the pendency of the suit; but the legislature has thought it fit to lay down that in the special case of a voluntary transfer such a defeasance of the plaintiff's right should not take place. The proviso, therefore, is in the nature of an exception to the general rule and should ordinarily be construed to affect transactions which come into existence after the passing of the Amending Act. It is also to be noted that in the earlier Amending Act of 1923 (Act No. VIII of 1923) the legislature took care to add section 3 specifically providing that the Act shall have a retrospective effect from 1922. There is no such section in the later Amending Act (Act IX of 1929). On the other hand, the Act is professedly not a declaratory or an explanatory Act but is an Amending Act, and it is not only called the Agra Pre-emption (Amendment) Act, but the preamble to the Act makes it clear that the legislature considered it expedient further to amend the Agra Pre-emption Act of 1922 and it was, therefore, necessary to enact certain provisions. Many alterations have been made in the Act and various sections have been amended, all of which cannot possibly be held to be merely explanatory of the previous provisions. There is, therefore, nothing in the Act which would indicate that it was intended to

have a retrospective effect. It seems to be that "No rule of construction is more firmly established than this, that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards a matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment." (Maxwell's Interpretation of Statutes, seventh edition, page 186). Various cases are quoted therein in which even where the Act had laid down that no suit shall be brought or maintained, etc., on account of some transaction, the courts declined to give it a retrospective effect so as to make it applicable to suits brought after the Act in respect of transactions which had taken place before the Act was passed. "Every statute which *prima facie* takes away or impairs vested rights acquired under existing laws or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed to be intended not to have a retrospective operation." (page 187). Similarly Craies in his Statute Law, pages 330-331 has quoted numerous authorities in support of the view that "In the absence of anything in an Act to show that it is to have a retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act is passed." (page 330).

In the case of *Colonial Sugar Refining Co., Ltd. v. Irving* (1) their Lordships of the Privy Council at page 372 laid down that "On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord

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Coke to the present day, the appellants would be entitled to succeed." The test laid down by their Lordships was that if the new Act touches a right in existence at the passing of the Act, then it should not be held to be applicable to a pending action.

In the case of *Sheopujan Rai v. Bishnath Rai* (1) a Bench of this Court held that the Amending Act (Act IX of 1929) was not a declaratory Act with retrospective effect and that it could not affect the right of pre-emption which was a substantive right and not a mere rule of procedure. No doubt the question in that case was whether the second appeal in the High Court should be decided in view of the amendment which had, in the meantime, come into effect; but the *ratio decidendi* of the case was that the defendant by acquiring a share in the village has a right to defeat the plaintiff's claim for pre-emption because he acquires the same status, and that a right to defeat the plaintiff's claim was a substantive right which could not be taken away by an Act passed after that right had accrued and while the action was still pending.

On the other hand, in the case of *Baldeo Singh v. Hargayan Singh* (2) another Bench of this Court came to the conclusion that the amendment would apply to a case where the Amending Act came into force before the first court's decree was passed. In point of fact, the Act had come into force after the suit in that case had been actually decided by the court below. But unfortunately the attention of the Bench was not drawn to the U. P. General Clauses Act, otherwise the appeal would have been decided in a different way and the question of the applicability of the Amending Act would not have arisen. But the decision, as it stands, is certainly in favour of the plaintiff appellant. In *Sheo Balak Chaudhuri v. Ram Saran Chaudhuri* (3), decided by a Bench of which one of the learned Judges

(1) (1930) I.L.R., 52 All., 886.

(2) [1933] A.L.J. 82.

(3) (1933) I.L.R., 55 All., 975.

who decided *Baldeo Singh's* case (1) was also a party, it was remarked in the course of the judgment on page 977 that "This right acquired by the vendees was a substantive right and extinguished the preferential right as against them."

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It seems to me that the right of pre-emption of a plaintiff, as defined in section 4(9), is a right to be substituted in place of the transferee by reason of his right. If, therefore, the vendee becomes a co-sharer in the village and acquires an equal or superior status with the plaintiff, the plaintiff's right to be substituted in place of the transferee disappears. It altogether ceases to exist and is utterly destroyed, though, of course, not by any act of the plaintiff himself but on account of the circumstance that the defendant has acquired an equal right. The right of pre-emption is a right of preference only and as soon as the position of both parties becomes identical and equal the preference disappears. It also seems equally clear that in order that the plaintiff should be able to pre-empt successfully he must have a continuing and subsisting right of preference and should, at no interval of time, have lost his right either owing to his own act or owing to an acquisition of the interest by the defendant, for at the moment when both the parties come on the same footing, the right of preference is gone and therefore the right of pre-emption of the plaintiff ceases to subsist. It cannot be disputed that if the plaintiff had a right of pre-emption at the time of the sale, but lost it for a short time and then by virtue of a fresh purchase became a co-sharer, he could not maintain the suit. Similarly if after having filed the suit he lost his right voluntarily and then re-acquired it, he would not be able to get a decree, the reason being that he has not a subsisting right at all, because his right has not continuously subsisted from the time of the original date of the cause of action in his favour.

(1) [1933] A.L.J., 80.



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It appears to me that the right of the defendant to defeat the plaintiff's right is a substantive right and not a mere matter of procedure which can be regarded as a plea in defence like the bar of limitation. The defendant by virtue of the deed of gift becomes a co-sharer in the village, who has a right to pre-empt other sales and he has an equal right to defeat the plaintiff's claim. This, in my opinion, is a substantive right and is in no sense inferior to a right which a plaintiff may have to go in appeal to a particular forum. Their Lordships in the case of *Colonial Sugar Refining Co., Ltd. v. Irving* (1) held that a right to go up in appeal to a particular forum was a substantive right and not a mere matter of procedure. It seems to me, therefore, that the right of a defendant to defeat the claim of the plaintiff on account of the defendant having himself become a co-sharer and acquired an equal status under a registered deed is much more a substantive right based on that document than a matter of procedure. That being so, the proviso in the Amending Act, which obviously deals with voluntary transfers and is intended to deprive a defendant from successfully setting up his right under the transfer under section 19, should not be so construed as to affect the defendant who had taken a transfer before the passing of the Act. By virtue of the transfer the defendant acquired a substantive right which became vested in him and such right should not be deemed to have been taken away by an Act which came into force subsequent to such an acquisition. I do not read the proviso as merely removing a prohibition to the courts from passing a decree against a defendant. I rather take it that the legislature thought it fit to provide for an exception in cases of voluntary transfers, because it felt that the absence of such a provision opened a wide door for fraud and enabled defendants to defeat claims for pre-emption after suits had been instituted. The intention, there-

(1) [1905] A.C., 569.

fore, seems to be that voluntary transfers should not be of any avail to defendants when they have been taken during the suit; but that involuntary transfers, e.g. purchase at auction or succession by operation of law of inheritance, would not deprive the defendant of his right to defeat the pre-emptor. The transfers which were taken before the Amending Act was passed are in my opinion not at all governed by this Amending Act.

It seems to me that when the legislature by amending sections 19 and 20 has obviously accepted the interpretation put upon them by this High Court, it is now too late in the day to say that the Full Bench ruling was wrong and that the legislature wrongly supposed that it was right and has made changes accordingly. I cannot possibly imagine that the Full Bench could in any way have overlooked sections 10 and 11 of the Pre-emption Act. They have not discussed those sections because in their opinion they did not in any way alter their interpretation of sections 19 and 20. Now to try to interpret section 19 so that it should apply only to cases where a vendee acquires an equal right of pre-emption before the institution of the suit would be to cause further confusion and would certainly nullify the intention of the legislature as disclosed by the limited scope of the proviso. The very fact that the legislature by the proviso has not altered the whole law, but has made a provision by way of an exception, indicates that the proviso could not have been intended to have a retrospective effect. The legislature would have said so clearly, if that had been the intention. Such an interpretation would make all transfers *pendente lite* utterly useless for vendees, whereas the proviso is deliberately confined to voluntary transfers only and leaves the interpretation put upon section 19 by the Full Bench unaffected as regards involuntary transfers, e.g., purchases at auctions, and inheritance. If an interpretation contrary to that put upon it by the Full Bench were to be put on section 19, the result

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would be that even where a vendee acquires an interest in the mahal by an auction purchase or by inheritance, he would not be able to defeat the plaintiff's claim. Such a result is, in my opinion, directly opposed to the intention of the legislature. I do not see how the word "defeat" (which has probably the same root as "defeasance") used in the proviso, can, in any way, suggest that the right was intended to be held in abeyance or in suspense only and not annulled, destroyed or extinguished. The position is similar to the case where a defendant after the sale deed has become a co-sharer of an equal status with the plaintiff, in which case the plaintiff's right to sue against him is gone. The mere fact that the defendant at a subsequent stage but before the expiry of one year loses his status as a co-sharer would not revive the plaintiff's right of pre-emption so as to enable him to bring a suit. On the same reasoning, I am of the opinion that the plaintiff's right of pre-emption, having been once lost on account of the defendant's acquisition, cannot be revived by the subsequent passing of the Amending Act, and that the new amendment does not revive extinguished rights.

I would, therefore, dismiss the appeal.

KENDALL, J.:—I agree throughout with the judgment of the learned CHIEF JUSTICE. One of the arguments addressed to us was that even if it be held that the Amending Act of 1929 has no retrospective effect generally, yet the wording of the proviso that has been added to section 19 by the Amending Act shows that it ought to be applied in the present case. That proviso is as follows: "Provided that no voluntary transfer made in favour of the vendee after the institution of a suit for pre-emption shall defeat any right which the plaintiff had at the date of such institution." The argument is, if I understand it aright, that the words in the proviso, "after the institution of a suit for pre-emption", must be held to apply to any suit which was pending when the enactment came into force.

The general rule of law, however, is that the status of the parties to a litigation must be considered to be the status which they possessed at the date of the institution of the suit. "In general, when the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights." (Maxwell on the Interpretation of Statutes, seventh edition, page 192), and again "In the absence of anything in an Act to show that it is to have a retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act is passed." (Craies on Statute Law, third edition, page 330).

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This being the general rule, it must follow that nothing in the proviso will affect the status of the parties in the litigation which was pending when the proviso came into force, unless the proviso itself or the enactment of which it is a part has a retrospective effect. It is true that in the present case the plaintiff's status was changed after the institution of the suit, but that was brought about by a deed of gift executed in the defendant's favour, and not by an enactment. The enactment itself not being retrospective, for the reasons given very fully by the learned CHIEF JUSTICE, it follows that the defendant's status was not changed by it during the litigation, and I would therefore agree in dismissing the appeal.

NIAMAT-ULLAH, J.:—I regret I have arrived at a different conclusion from the one reached by my learned brothers. The facts of the case are fully set out in the order of the Hon'ble the CHIEF JUSTICE, dated the 14th of November, 1933, referring the case to a Division Bench, which in its turn referred it to this Full Bench. I would repeat such of them as are necessary for explaining my own views on the questions involved in the case.

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The sale deed which is sought to be pre-empted by the plaintiff appellant was executed on the 9th of November, 1928. He filed his suit for pre-emption on the last day but one, i.e. the 8th of November, 1929. On the facts as they existed on the date of suit he had an unanswerable claim. The vendees set about to find a good defence, and managed to obtain a deed of gift on the 6th of February, 1930, during the pendency of the pre-emption suit, conferring proprietary right which placed them on the same footing as the plaintiff in the matter of pre-emption. They pleaded that, by virtue of their latest acquisition, the plaintiff had no preferential claim to pre-empt and his suit was, therefore, liable to be dismissed. The plaintiff attempted to checkmate this move on the part of the vendees by instituting a suit for pre-emption in respect of the gifted property on the allegation that the transaction was not of gift but of sale. The first court decreed both the suits, holding that the transaction of gift was a sale in disguise. That court passed a decree for pre-emption on the 20th of December, 1930, which is an important date. The plaintiff's suit for pre-emption in respect of the gifted property was eventually dismissed by the High Court on the finding that the transaction had not been established to be otherwise than a gift. The position then was that the vendees had acquired proprietary rights during the pendency of the first instituted pre-emption suit, and the question was whether the suit was liable to be dismissed on that account.

Before the passing of the Pre-emption Act, the case law of this Court had laid down definitely that where the pre-emptor and the vendee have equal rights in the matter of pre-emption no suit for pre-emption can lie. The view was based on the broad ground that the object of pre-emption is to exclude strangers; and where the vendee is not a stranger no pre-emption should be allowed. This rule opened a door for devices to defeat pre-

emption, and the courts were called upon to decide as to what is the effect of the vendee, who was a stranger at the time of the sale deed, acquiring proprietary right after the sale and even after the institution of a suit for pre-emption. It was consistently held in this Court that no decree for pre-emption could be passed, unless the pre-emptor showed his preferential right not only at the dates of sale and the institution of the suit but also at the time of the decree; so that, if the vendee acquired the requisite status during the pendency of the suit for pre-emption, he could successfully prevent a decree for pre-emption being passed. See, for example, the case of *Bihari Lal v. Mohan Singh* (1).

These propositions are not disputed in this case, which is governed by a statute, viz. the Pre-emption Act, which was passed in 1922 and came into force on the 17th of February, 1923. The question whether the vendee could defeat pre-emption by acquiring proprietary right during the pendency of the pre-emption suit based on the Pre-emption Act arose in *Ram Saran Das v. Bhagwat Prasad* (2). It was held by a Full Bench of this Court that the Act did not introduce any change in this respect. This view is based on section 19 of the Pre-emption Act, which provides that "No decree for pre-emption shall be passed in favour of any person unless he has a subsisting right of pre-emption at the time of the decree." It was held that the right of pre-emption does not subsist if the vendee obtained a proprietary right during the pendency of the suit. If the question had been *res integra*, I would have examined the various sections of the Pre-emption Act in order to answer it. I may, however, take leave to point out, with great respect, that the learned Judges did not consider the scheme of the Act and other relevant sections, and confined their attention to sections 19 and 20, and attached too great importance to the view taken in decided cases before the law of pre-emption

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(1) (1920) I.L.R., 42 All., 268.

(2) (1928) I.L.R., 51 All., 411.

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was embodied in a statute. The essence of a Code is to be exhaustive on matters it provides for, except so far that it lets in extrinsic rules. Where the language of a statute makes two views equally possible, the rule of *cursus curiae* may be applied to harmonise the statute with pre-existing law. Where, however, the meaning of a statute is clear, interpretation thereof as does not fit in with the general scheme of the statute or is inconsistent with other provisions therein embodied is not justified by the excuse that the *cursus curiae* should be maintained.

Sections 10 and 11 of the Pre-emption Act, to which the attention of the Full Bench was not drawn, have, in my opinion, an important bearing on the question before us. They run as follows:

"10. On a sale to, or foreclosure by, any of the persons named in section 12, no right of pre-emption shall accrue to any person who has an equal or inferior right of pre-emption.

"11. Subject to the foregoing provisions, a right of pre-emption shall accrue to the persons mentioned in section 12 whenever a co-sharer or petty proprietor sells any proprietary interest in land forming part of any mahal or village in which a right of pre-emption exists, or when any such interest is foreclosed."

The effect of a vendee possessing an equal right of pre-emption is declared by section 10 to be to prevent the accrual of a right of pre-emption. It is quite clear that a right of pre-emption accrues to persons named in another section if the vendee has no equal or superior right of pre-emption. Section 16 permits a suit for pre-emption by the person entitled to pre-empt. If there had been nothing to the contrary in the Act, a right of pre-emption accruing under section 11 could be enforced in spite of the vendee acquiring an equal or superior right of pre-emption after the date of sale; but the legislature thought it fit to extend protection to the vendee who obtains such right after the date of

sale, and provided in section 20: "No suit for pre-emption shall lie where prior to the institution of such suit the purchaser has transferred the property in dispute to a person having a right of pre-emption equal or superior to that of the plaintiff, or has acquired an indefeasible interest in the mahal which, if existing at the date of the sale or foreclosure, would have barred the suit."

There is room for argument that this section affords protection not only to a vendee acquiring an equal right of pre-emption before the institution of the suit, but also after it. This argument was dealt with by the Full Bench above referred to and negatived. We must, therefore, accept section 20 as laying down in express terms that no suit for pre-emption shall lie where the vendee has acquired an equal right of pre-emption before the institution of the suit. If it was the intention of the legislature to afford protection to a vendee acquiring such right after the institution of the suit, it is inconceivable to me that no express provision was made in that behalf. It was pointed out by one of the learned Judges composing the Full Bench that section 20 does not deal with the case of a vendee acquiring an equal right of pre-emption during the pendency of the suit, as its language will not fit in with such a case in view of the opening words of the section that "No suit for pre-emption shall lie". It is said that if a suit has already been instituted, the words "shall lie" are wholly inapplicable to the case of a vendee acquiring an equal right of pre-emption during the pendency of a suit. With all respect, I am unable to appreciate this reasoning. The legislature could easily have altered the language. Moreover, a suit may lie in its inception, but may cease to be maintainable during the pendency thereof. As soon as the vendee acquires an equal right, the suit would cease to be maintainable. Be that as it may, we have to take it that section 20 was not the proper place for giving

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protection to a vendee acquiring an equal right of pre-emption during the pendency of a suit, and the Full Bench thought that that matter had been provided for by section 19, which originally ran as follows: "No decree for pre-emption shall be passed in favour of any person unless he has a subsisting right of pre-emption at the time of the decree; but where a decree for pre-emption has been passed in favour of a plaintiff whether by a court of first instance or of appeal, the right of such plaintiff shall not be affected by any transfer or loss of his interest occurring after the date of such decree."

The Full Bench imported into the interpretation of section 19 the case law in which it has been held before the Act that a pre-emptor must show a subsisting cause of action at the date of the decree. They held accordingly that the pre-emptor's right does not subsist within the meaning of section 19 if the vendee has acquired before the decree an equal right of pre-emption. It is conceded that there is nothing in the Act which lays down that the pre-emptor's right ceases to subsist on the vendee acquiring during the pendency of the suit an equal right of pre-emption. On the contrary, I am of opinion that there are clear indications in the Act which show otherwise. I have already referred to sections 10 and 11, and the intention of the legislature underlying them. Consistently with that rule, section 20 merely creates a bar against the pre-emptor if the vendee acquires an equal right after the sale but before the suit. It is to be noted that the right of pre-emption, which previously accrued under section 11, is not destroyed by section 20, which merely creates a bar by providing that no suit for pre-emption shall lie and does not lay down that the pre-emptor's right has ceased to exist. The law makes a clear distinction between the extinguishment of a right and a bar to the exercise of it. Section 20 clearly recognizes the existence of the right which accrued under section 11, but

bars the enforcement thereof. To hold that under section 19 the right of pre-emption is extinguished by the vendee acquiring a right after the institution of the suit is to put him on a different, if not a higher, footing than a vendee acquiring such right before the suit. There is no reason to suppose that the framers of the Act had any such distinction in their mind.

I have ventured to offer some observations on the view taken by the Full Bench because their judgment is silent on the points indicated above. In interpreting the Full Bench ruling I would take its effect to be that the case law, as it stood before the Pre-emption Act, is applicable so far as the vendee acquiring a right of pre-emption *pendente lite* is concerned. Though in different cases different languages have been employed, I have not been able to find any case which has gone the length of holding that the right of pre-emption is extinguished. In most cases it has been said that the right of pre-emption is "defeated". In theory, at any rate, and as will presently appear, the distinction is important; there is a difference between a right being "extinguished" and a right being "defeated". In one case the right itself vanishes, while in the other the right exists but cannot be effectively exercised. A creditor, whose right is defeated by an alienation by his debtor, cannot be said to have lost his right. The word "defeat" occurs in section 53 of the Transfer of Property Act; but it cannot be suggested that any extinction of the creditor's right is implied in that term. Similarly lapse of limitation defeats a right but does not destroy it, except within the limits of section 28 of the Limitation Act.

This distinction assumes some importance in applying the proviso which was added to section 19 by the Amending Act IX of 1929, passed not long after the Full Bench decision in 1928. That proviso runs as follows: "Provided that no voluntary transfer made in favour of the vendee after the institution of a suit

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for pre-emption shall defeat any right which the plaintiff had at the date of such institution." If the proviso is applicable to the circumstances of this case, there can be no difficulty in decreeing the plaintiff's suit; but the Amending Act was published in the official Gazette on the 15th of February, 1930, and it became operative from that date under section 5 of the U. P. General Clauses Act I of 1924, that is to say, after the institution of the suit for pre-emption but before the suit was decided by the first court on the 20th of December, 1930. It is argued that retrospective effect cannot be given to the proviso which can apply only to suits instituted after the Amending Act came into force. This contention has found favour with my learned brethren: but I am unable to accept it, for two reasons. The first is that the proviso must be read with the section to which it is appended. It should not be taken as a rule standing apart from section 19. If we read the section and the proviso together, it seems to me that the crucial date is the date of the decree; and as the Amending Act had come into force before the court of first instance passed its decree, it should be applied, and no retrospective effect is implied in its application to the present case. To make myself clear, I would reproduce the section with the proviso. They now run as follows: "No decree for pre-emption shall be passed in favour of any person, unless he has a subsisting right of pre-emption at the time of the decree . . . provided that no voluntary transfer made in favour of the vendee after the institution of a suit for pre-emption shall defeat any right which the plaintiff had at the date of such institution."

The section is a direction to a court. If the court finds, when it proposes to pass a decree, that there is a certain rule of law laid down for its guidance, it must follow it in passing its decree. If the Amending Act had come into force after the first court passed its decree, and the proviso is applied at the stage of the

appeal, retrospective effect would be given to it, but not if it was on the statute book when the decree is to be passed.

The proviso does not create any right, nor does it divest anyone of his right. The right of pre-emption, which it is its object to protect, accrued long before the institution of the suit; it did so under section 11, when the sale deed was executed. Nothing happened after the accrual of that right which might have had the effect of extinguishing it. As already observed, the acquisition of an equal right by the vendee operates as a bar to the court passing a decree for pre-emption. Section 19, or any other section of the Pre-emption Act, or the case law before it, did not lay down that the right of pre-emption is destroyed in those circumstances. I emphasise this point, because it was mentioned in course of the arguments that the proviso could not revive a right which had been extinguished by the vendee acquiring an equal right by gift. This contention is based on an assumption which is wholly unwarranted. The right was neither extinguished, nor was in abeyance. It was a right which section 19, as it stood before the Amending Act, did not allow the court to give effect to. The proviso having been added before the court proceeded to pass the decree, must be given effect to.

The second ground on which I base my conclusion is that section 19 is so worded as to make the rule therein contained as a rule of procedure rather than a rule of substantive law. Mark the similarity between the opening words of section 11 of the Code of Civil Procedure and section 19 of the Pre-emption Act. Both sections embody directions to the court and have no reference to the substantive rights of the parties. Similarly section 3 of the Indian Limitation Act directs courts not to entertain a suit instituted after the expiry of limitation provided therefor. None of these is a rule of substantive law. All of them provide the manner

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in which the court is to act. To my mind section 19, read with the proviso, lays down how the court is to act in passing a decree for pre-emption. It is a well settled rule of law that an enactment which provides procedure applies to suits pending at its date. The proviso read with section 19 is a direction to the court to pass or not to pass a decree in certain cases. If the court finds that a right of pre-emption had accrued to the plaintiff, and the vendee did not acquire an equal right before the institution of the suit but acquired it by a voluntary transfer afterwards, it must proceed to pass a decree.

In the result, I would allow the appeal, set aside the decree of the lower appellate court and restore that of the court of first instance.

BY THE COURT:—The appeal is dismissed with costs

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## REVISIONAL CIVIL

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and  
Mr. Justice Bennet*

SHIVA PRASAD (PLAINTIFF) *v.* PAHLAD SINGH  
(DEFENDANT)\*

1935  
March, 27

*Criminal Procedure Code, section 476B—Appeal to District Judge against complaint, or refusal to make a complaint, by a Munsif—Transfer of appeal to Subordinate Judge—Jurisdiction—Civil Procedure Code, section 24—Bengal, Agra and Assam Civil Courts Act (XII of 1887), section 22.*

An appeal to the District Judge, under section 476B of the Criminal Procedure Code, from the making of a complaint, or the refusal to make a complaint, by a Munsif in a proceeding under section 476 of the Code, can not be transferred for disposal to a Subordinate Judge.

The transfer could not be authorised by section 24 of the Civil Procedure Code, for even if that section were applicable the transfer could not be made to the Subordinate Judge, inasmuch as he was not competent to try and dispose of such an appeal. Nor could the provisions of section 22(1) of the Bengal, Agra and Assam Civil Courts Act authorise the transfer or confer jurisdiction on the Subordinate Judge; for that section deals with appeals from "decrees and orders" and the making of a complaint or the refusal to make a complaint under section 476 of the Criminal Procedure Code is not an "order", as it does not adjudicate upon any rights of the parties at all; further, the words "decrees and orders" in section 22(1) are meant to refer to decrees and orders passed in proceedings to which the Civil Procedure Code would apply.

*Karimullah v. Rameshwar Prasad* (1), dissented from.

Messrs. *Saila Nath Mukerji* and *K. D. Malaviya*, for the applicant.

*Mr. Kumuda Prasad*, for the opposite party.

SULAIMAN, C.J., and BENNET, J.:—This is an application in revision from orders passed by the First Subordinate Judge of Meerut. After deciding a civil suit the Munsif had made a complaint against the defendant in respect of suspected forgery committed by him as also

\*Civil Revision No. 443 of 1934.

(1) (1928) I.L.R., 51 All., 344.

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certain false statements made in the course of the suit, but had refused to make any complaint against the witnesses for the defendant. The defendant appealed to the District Judge in respect of the complaint made against him and the plaintiff filed appeals to that court against the witnesses against whom no complaint had been made. The learned District Judge transferred all these appeals to the court of the First Subordinate Judge to dispose of them. He declined to make any complaint against the witnesses and also directed the withdrawal of the complaint against the defendant.

In revision the plaintiff applicant prays that the orders be set aside as having been passed without jurisdiction.

No doubt, inasmuch as the proceeding has arisen out of a suit decided by a Munsif, it is a matter of a civil nature and section 439 of the Code of Criminal Procedure would not be applicable, but section 115 of the Code of Civil Procedure only applies: See *In the matter of the petition of Bhup Kunwar* (1) and *Salig Ram v. Ramji Lal* (2). The Subordinate Judge has entertained the appeals filed in the court of the District Judge which were transferred to his court and has certainly disposed of them finally and they are no longer pending in his court. There can, therefore, be no doubt that there is a case decided by him within the meaning of section 115 of the Code of Civil Procedure.

It is contended on behalf of the respondent that the District Judge had jurisdiction under section 24 of the Code of Civil Procedure to transfer these cases to the court of the Subordinate Judge. But it is quite obvious that even if section 24 were applicable, the District Judge could not transfer these cases to the Subordinate Judge unless the latter was competent to try or dispose of the same.

There has been some conflict of opinion in this Court as to whether a Subordinate Judge is competent to dispose of such matter on appeal or not. The cases of

(1) (1903) I.L.R., 26 All., 249.

(2) (1906) I.L.R., 28 All., 554.

*Ram Charan v. Mewa Ram* (1) and *Narain Das v. Emperor* (2) are both distinguishable inasmuch as there the appeal had been transferred to the court of the Additional District Judge and not to a Subordinate Judge. Section 8, sub-section (2) of the Bengal, Agra and Assam Civil Courts Act (Act XII of 1887) might well have been applied to such a case, because, under that section, Additional Judges can discharge any of the functions of a District Judge which the District Judge may assign to them and when discharging such functions they exercise the same powers as the District Judge. The word "function" is wide enough to include the hearing of appeals under section 476B.

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As regards the transfer to a Subordinate Judge, there is the case of *Karimullah v. Rameshwar Prasad* (3), decided by MUKERJI, J., in which it was distinctly held that a District Judge is competent to transfer to a Subordinate Judge an appeal from "an order" passed by a Munsif under section 476. In that case it was taken for granted that the proceeding in the Munsif's court terminated in "an order". It does not appear to have been argued before the learned Judge that the proceedings did not terminate in "an order" within the meaning of section 22 of the Bengal, Agra and Assam Civil Courts Act. The case relied upon as authority, namely *Narain Das v. Emperor* (2), was, as already pointed out, distinguishable.

On the other hand, it has been held in the case of *Manphool v. Budhhu* (4) by one of us that it is not open to a District Judge in whose court an appeal under section 476B of the Code of Criminal Procedure is pending to transfer that appeal to the court of a Subordinate Judge as the Subordinate Judge has not got jurisdiction to hear such an appeal. Similarly BAJPAI, J., has held in the case of *Mehdi Hasan v. Emperor* (5) that the District Judge has no jurisdiction under the

(1) (1921) I.L.R., 43 All., 409.

(2) (1927) I.L.R., 49 All., 792.

(3) (1928) I.L.R., 51 All., 344.

(4) (1934) I.L.R., 57 All., 785.

(5) (1934) I.L.R., 57 All., 687.



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Criminal Procedure Code to transfer such an appeal to the Subordinate Judge.

The main question for consideration, therefore, is whether a Subordinate Judge has such jurisdiction under section 22, sub-section (1) of the Bengal, Agra and Assam Civil Courts Act. That sub-section provides that a District Judge may transfer to any Subordinate Judge under his administrative control any appeals pending before him from the decrees or orders of Munsifs. It is, therefore, quite obvious that unless the proceeding in the court of the Munsif terminated in "an order" within the meaning of this sub-section the Subordinate Judge would not have any jurisdiction to hear the appeal. The word "order" has not been defined in the Act, but it occurs just after the word "decree" and an indication as to what it connotes can to some extent be gathered from the definition of "order" in section 2. sub-section (14) of the Code of Civil Procedure by way of analogy. According to that definition an order means the formal expression of any decision of a civil court which is not a decree. Now section 476 of the Code of Criminal Procedure does not anywhere say that the Munsif in making the complaint has to pass an order to that effect. It requires the civil court to make a complaint in writing signed by the presiding officer of the court and to forward the same to a Magistrate having jurisdiction. Section 476B which permits an appeal to be preferred by the aggrieved party does not say that the appeal is from any "order" passed by the original court. Again, the appellate court is not required to make any "order" on appeal, but has authority either to make complaint itself or to direct the withdrawal of the complaint as the case may be. One may in a loose way call it an order, but strictly speaking it is not so.

It seems to us that the mere fact that an appeal is provided to the same forum to which appeals ordinarily lie from the appealable decrees or sentences of the original court does not in any way show that the appeal is from the Munsif's "order". When we come to

examine the nature of the proceeding it is quite obvious that the court being satisfied *prima facie* that there is a fit case for inquiry simply makes a complaint; it does not and cannot decide any matter finally against the person against whom the complaint is made nor is there any adjudication of any rights of the parties at all. Sections 18 to 21 of the Civil Courts Act deal with the ordinary jurisdiction of District Judges, Subordinate Judges and Munsifs which is declared to extend to all original suits for the time being cognizable by civil courts, and provision is made as to which court appeals would lie in. Section 22 uses the same words "decrees or orders" as occur in section 20 and section 21. It seems to follow that the words "decrees and orders" were meant to refer to decrees and orders passed by a Munsif in civil proceedings pending before him to which the Code of Civil Procedure would apply; whereas the making of a complaint under section 476 is an act done by the Munsif under the authority conferred upon him by section 476 of the Code of Criminal Procedure.

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In these circumstances it seems to us that it is difficult to say that the Munsif in making the complaint is passing an order within the meaning of section 22 of the Bengal, Agra and Assam Civil Courts Act. With great respect we are unable to agree with the view expressed in *Karim-ullah v. Rameshwar Prasad* (1). Following the view expressed in the two later cases quoted above, we hold that the Subordinate Judge had no jurisdiction whatsoever to hear these appeals.

We may, however, point out that where by the special notification mentioned in section 21, sub-section (4) of the Civil Courts Act appeals from decrees and orders of Munsifs are directed to be preferred to the court of such a Subordinate Judge, he would become the court to which appeals ordinarily lie from the appealable decrees of the former court under section 195, sub-section (2), and therefore an appeal would lie to him under section

(1) (1928) I.L.R., 51 All., 344

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476B. In such a case there will be no question of the appeal being transferred by the District Judge to the court of the Subordinate Judge, as the appeal would be filed in his court direct.

The revision is accordingly allowed and the order of the Subordinate Judge withdrawing the complaint against the defendant Pahlad Singh is set aside and the case is sent back to the court of the District Judge for disposal according to law. As the transfer of the appeal was by the District Judge *suo motu*, we direct that the parties should bear their own costs of this revision.

### APPELLATE CIVIL

1935  
March, 28

*Before Mr. Justice Niamat-ullah and Mr. Justice Allsop*

JAWAHIR RAM AND OTHERS (PLAINTIFFS) v. JHINGURI LAL  
AND OTHERS (DEFENDANTS)\*

*Limitation Act (IX of 1908), article 116—Breach of warranty of title and covenant for quiet possession—Sale by manager of joint Hindu family—Sale set aside on suit by sons—Vendee deprived of property—Suit for refund of price and compensation—Limitation—Terminus a quo—Whether from decree of first court or of appellate court.*

Joint Hindu family property was sold by the manager, with an express covenant for title and quiet possession, under which the vendees would be entitled to compensation if any sort of defect was found in respect of the share sold and it was interfered with. Upon a suit by the sons the sale was set aside, for want of legal necessity, in January, 1924, and they obtained delivery of possession against the vendees in February, 1924. An appeal by the vendees to the District Judge was dismissed in January, 1926, and a second appeal to the High Court was dismissed in October, 1928. In June, 1930, the vendees sued the vendor for refund of the price and damages, basing their claim on the breach of covenant:

*Held* that the suit was barred by limitation under article 116 of the Limitation Act, and the six years' period under that article began to run from the breach of the contract, which

\*First Appeal No. 12 of 1932, from a decree of M. Owais Karney, Subordinate Judge of Gorakhpur, dated the 31st of August, 1931.

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took place when defect of title was found and possession was interfered with as the result of the decision of the first court. The plaintiffs' cause of action was complete when the first court found that the vendor had no power to sell and the vendees were dispossessed. The decree of the trial court remained operative throughout the litigation, which was carried up to the High Court, and the subsequent affirmance of the decree on appeal could not give a fresh starting point for limitation.

Mr. *Haribans Sahai*, for the appellants.

Mr. *S. B. Johari*, for the respondents.

NIAMAT-ULLAH and ALLSOP, JJ.:—This appeal has arisen from a suit brought by the appellants for refund of the price paid by them for a zamindari share in two villages to defendant No. 1 and his deceased brother Mahadeo Prasad, who executed a sale deed on the 15th of April, 1907, in favour of some of the plaintiffs and the predecessors of the others. The principal question which arises in appeal is whether the suit has been rightly held by the lower court to be barred by limitation.

The plaintiffs were deprived of the property conveyed by the aforesaid sale deed in consequence of a decree for possession obtained by the sons of defendant No. 1 in suit No. 69 of 1923. The sons impugned the sale deed executed by their father and Mahadeo Prasad on the ground that the property which it purported to convey belonged to the joint family of which the plaintiffs of that suit and the vendors were members and that there was no legal necessity for the alienation. The suit was decreed by the first court on the 31st of January, 1924. Delivery of possession was taken by the successful plaintiffs on the 27th of February, 1924. Part of the land included in the shares was under the cultivation of the vendees, who did not vacate it. Disputes arose between the sons of defendant No. 1 and the vendees, which led to proceedings under section 145 of the Criminal Procedure Code. These proceedings resulted in favour of the vendees; and the sons of defendant No. 1 had to institute another suit for possession in respect of the

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plots which had remained in possession of the vendees in spite of the symbolical delivery of possession. It is not disputed that the vendees retained possession of such plots till a time within six years before the institution of the present suit, which was brought on the 30th of June, 1930. From the decree obtained by the sons in the court of first instance the vendees had appealed to the District Judge, who dismissed it on the 19th of January, 1926. A second appeal to the High Court was dismissed on the 31st of October, 1928. A Letters Patent appeal was likewise dismissed on the 2nd of June, 1930. It would be seen that the present suit is within six years from the judgment of the District Judge and the judgments of the High Court in second appeal and in Letters Patent appeal, and from the time when they finally lost possession of the plots actually cultivated by them. It was, however, brought more than six years after the decree of the first court and after the "*dakhal dehani*" in respect of the shares in dispute. The controversy between the parties relates to the starting point of limitation. The present suit must be held to be barred, whichever article of limitation mentioned in the course of the arguments (articles 62, 97, 116 and 120) be considered to be appropriate, if time is taken to have run from the date of the decree of the trial court or the date of delivery of possession. If, on the other hand, time be reckoned from the decree of any of the courts of appeal, the suit is in time if article 116 is applicable. If the period of limitation be reckoned from the final judgment of the High Court, the suit is in time whichever article referred to be applied.

To determine the proper article of the Limitation Act applicable to the circumstances of the case and the starting point thereunder, the nature of the plaintiffs' claim has to be examined. The plaintiffs claimed refund of the price and damages, basing their claim on a covenant contained in the sale deed dated the 15th of April, 1907, which runs as follows: "Now, we, the

executants, or our heirs; neither have nor shall have any concern or connection with the shares sold. If in future we, the executants, or our heirs, bring any sort of claim in respect of the thing sold, it shall be false and illegal. If by reason of the act of us, the executants, or the omission of us, the executants, or our heirs, any sort of defect is found in respect of the share sold and it is interfered with, the vendees shall have the power to recover by proper means the whole of their sale consideration from our house and movable and immovable property."

The plaintiffs are also entitled to rely on the implied covenant imported into every sale deed by section 55(2), Transfer of Property Act, whereby "the seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same." The implied covenant is, however, less comprehensive than the express covenant quoted above, as it also includes the undertaking which, by force of statute, is part of every contract of sale in respect of immovable property. If there had been anything in the express covenant overriding the implied covenant, the latter would have been superseded to that extent. The present case is free from any such complication.

It has been held in numerous cases that article 110 of the first schedule to the Indian Limitation Act is applicable to a suit for compensation by a vendee who has been deprived of the property purchased by him in consequence of a defect in the title of the vendor. See, for instance, *Muhammad Siddiq v. Muhammad Nuh* (1), in which a large number of cases are referred to and discussed. In certain cases a distinction has been drawn between cases in which a vendee is dispossessed and those in which he was unsuccessful in obtaining possession. To the latter class of cases article 97 has been held to be more appropriate. We are of opinion that, having regard to the frame of the present suit, it cannot

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(1) (1930) I.L.R., 52 All., 604.

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be regarded otherwise than as a suit for compensation for breach of a contract in writing and registered, and that article 116 is applicable. The plaintiffs charge the defendants with a breach of warranty of title and of a covenant for quiet enjoyment. The measure of compensation is claimed to be the price paid by them together with out-of-pocket expenses incurred in defending their title. The covenant contained in the sale deed, of which the breach is complained, is expressly referred to in the plaint.

The material question to determine is the starting point of limitation. According to the language of article 116 read with article 115, it is clearly the time when the contract, of which the breach is complained of, was broken. According to the covenant, on which the plaintiffs' claim rests, they are entitled to compensation "if any sort of defect is found in respect of the share sold and it is interfered with". It was found by the trial court in the suit by the sons of defendant No. 1 that there was no legal necessity for the sale, which the vendors were not empowered to make according to Hindu law. The vendees' possession was interfered with when delivery of possession was given to the successful plaintiffs of suit No. 69 of 1923. It is argued that the plaintiffs' cause of action did not arise until both contingencies happened, that is, defect was found in the title of the vendors and possession of the vendees was interfered with, and that it cannot be said that the defect was found until the High Court finally decided that the sale was invalid. Reliance is placed on *Sarvothama Rao v. Chinnasami Pillai* (1), which was a suit by the vendee for compensation, after his suit for possession was dismissed by the first appellate court and the High Court, though it had been decreed by the trial court. The learned Judges apparently applied article 97 of the Limitation Act and took the judgment of the High Court as the *terminus a quo*. The suit would have been barred if limitation had been reckoned from the

(1) (1918) I.L.R., 42 Mad., 507

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date of the judgment of the first appellate court. The case is certainly an authority for the view that the limitation runs from the date of the final decision of the High Court. The learned Judge observed that "It was only when it was finally determined that the sale by the plaintiff's vendor could not take effect against the sale by the manager that the former sale became infructuous; consequently it was only then that the consideration failed." The same view had been taken by the Madras High Court in an earlier case, *Rajagopalan v. Somasundara Thambiran* (1), wherein it was held in similar circumstances that "Where, as in the present case, a man has been dispossessed by suit, it would, in our opinion, be equally unreasonable to require him to sue for relief founded on such dispossession before the date of the final decree under which he was dispossessed. The dispossession in execution of the decree of the court of first instance was not final but subject to the result of an appeal, and the effect of filing of the appeal was to reopen the question of his right to possession and make it once more *sub judice* pending the decision of the appeal. If the appellant had succeeded, his dispossession under the decree of the court of first instance would have been disregarded for purposes of limitation and he would have been held to have been in possession throughout."

In a somewhat hard case like the one before us the reasoning on which the decision of the Madras High Court proceeds is attractive. The existence or absence of legal necessity is highly controversial in many cases of alienations by the manager of a joint Hindu family, and the vendee may honestly believe that an adverse decision given by the trial court is erroneous and is likely to be reversed in appeal. It is but reasonable that he should have an opportunity of challenging it by an appeal to a higher court. At the same time, it should be borne in mind that the period of six years is sufficiently long to enable a vendee to fight out his case in

(1) (1907) I.L.R., 30 Mad., 316.



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the courts of appeal and, at any rate, in the first court of appeal, which is the last court so far as facts are concerned. The ground on which the Madras view proceeds is, to our mind, negatived by a dictum of their Lordships of the Privy Council in *Juscurn Boid v. Pirthichand Lal Choudhury* (1). The facts of that case are not similar; but the argument repelled by their Lordships is the same as put forward before us and as was given effect to in the two Madras cases cited above. The question before their Lordships was whether failure of consideration occurred when an adverse decision was given by the trial court or when it was affirmed by the High Court. Their Lordships said: "But by the decision in the first suit, No. 248 of 1904, the sale was reversed in its entirety and for all purposes irrespective of the decrees in the three later suits, so that if the reversal of the sale is the cause of action, the only question is whether time began to run, as the plaintiff alleges, from the 3rd of August, 1906, the date of the appellate decree, or, as the defendant respondent contends, from the 24th of August, 1905, the date of the original decree in suit No. 248 of 1904." (The decree of the first court had been affirmed in appeal.) "Both courts have held that the failure of consideration was at the date of the first court's decree. Their Lordships feel no doubt that as between these two decrees this is the correct view, for whatever may be the theory under other systems of law, under the Indian law and procedure an original decree is not suspended by presentation of an appeal, nor is its operation interrupted where the decree on appeal is one of dismissal." It is clear to us that this dictum runs counter to the reasons on which the decision of the Madras High Court is founded. Their Lordships do not recognize that in India the controversy, set at rest by the decree of the first court, is again *sub judice* if an appeal is presented, so as to interrupt the operation of the decree appealed from where it is affirmed in appeal. It may be otherwise where it is reversed or

(1) (1918) I.L.R., 46 Cal., 670(678).

interfered with on appeal. In the case before us it was found by the court of first instance that the sale was invalid, and effect was given to its decree by delivery of possession. The vendees either did not apply to the courts of appeal for stay of execution, or they applied but were unsuccessful. In either case, the decree of the trial court remained operative throughout the litigation which was carried up to the High Court. We think that the plaintiffs' cause of action was complete when the first court found that the vendors had no power to sell and the vendees were dispossessed. Subsequent affirmance of the decree of the trial court cannot give a fresh starting point. The fact that the vendees managed to retain actual possession of part of the land included in the vended property in spite of delivery of possession cannot save limitation. They were deprived of the shares sold, by delivery of possession. If, in disregard of the process of law, they retained possession of the "sir" and "khudkasht" cultivated by them and had to part with it later on, it cannot be relied on as showing that their cause of action accrued long after the delivery of possession. The covenant, on which the plaintiffs' suit is based, gives them a right to sue when "interference" with their possession occurs. It cannot be said that no interference occurred when delivery of possession was taken by the successful plaintiffs of suit No. 69 of 1923. The breach of the covenant under the law takes place when interference falling short of complete dispossession occurs, for it follows another contingency contemplated by the covenant, namely, "defect is found". We think that the finding of the court of first instance in the suit brought by the sons of defendant No. 1, followed by delivery of possession, which at least amounts to interference within the meaning of the covenant, made time running against the plaintiffs under article 116, Limitation Act.

Articles 62 and 97 were referred to in the course of the arguments and relied on by the respondents. These articles provide shorter periods of limitation and, if they

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be applied, the plaintiffs' suit is barred; but for the reasons already stated we do not think they can apply, having regard to the circumstances and the frame of the present suit. It was faintly suggested on behalf of the appellants that article 120 is applicable, as no other article is appropriate. As we hold that article 116 is applicable, the residuary article 120 cannot apply.

The result is that this appeal fails, and is dismissed with costs.

*Before Mr. Justice Niamat-ullah and Mr. Justice  
Rachhpal Singh*

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March, 28

TAHIR HASAN (JUDGMENT-DEBTOR) v. CHANDRA SEN  
(DECREE-HOLDER)\*

*Jurisdiction—Execution court questioning whether property directed by the decree to be sold is saleable under the law—Pensions Act (XXIII of 1871), sections 4, 11, 12—Suit for sale on mortgage—Objection by one defendant that property was non-transferable pension, overruled and suit decreed—Decree ex parte as against another defendant—Latter objecting in execution court that property was non-saleable pension—Res judicata—Principle of constructive res judicata how far applicable in execution proceedings.*

In a suit for sale on a mortgage one of the mortgagors defendants raised the objection that the mortgaged property was non-transferable pension within the meaning of section 12 of the Pensions Act, 1871; but the court found against this objection and decreed the suit. The decree was *ex parte* as against another mortgagor defendant who had not appeared in the suit; but he appeared in the execution court and objected to the sale of the property on the ground that it was non-saleable pension within the meaning of section 11 of the Pensions Act:

*Held (RACHHPAL SINGH, J., dubitante) that the objection could be raised and the execution court had jurisdiction to entertain it.*

The question was not whether the court passing the decree had jurisdiction to pass it; even if its decision that the property was

\*First Appeal No. 400 of 1933, from a decree of Pran Nath Aga, Subordinate Judge of Moradabad, dated the 26th of August, 1933.

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validly mortgaged was erroneous, that would not make the decree a decree passed without jurisdiction. The question that arose was whether the court executing the decree could sell the property; it was open to the present objector to raise that question, and the execution court could not refuse to hear evidence to prove that the property which it was directed by the decree to sell was one the sale of which in execution was prohibited by section 11 of the Pensions Act.

The decision, in the suit itself, of the question whether the property could be mortgaged did not bar the raising in the execution court of the objection as to non-saleability of the property under section 11 of the Pensions Act; section 11 had not been pleaded in the suit, nor could it be pleaded at that stage; so, the question of saleability in execution was not directly and substantially in issue in the suit itself. Again, that decision was not as against the present objector, who did not contest the suit; and it could not operate as *res judicata* against him except by applying the principle of constructive *res judicata*, which principle was not applicable to execution proceedings. Further, it could not be said that he might and ought to have raised the objection in the suit itself; on the contrary he would be estopped from derogating from his own mortgage by pleading that the property was not transferable. There was no such estoppel against his objecting to the saleability of the property in execution.

*Per RACHHPAL SINGH, J.*—The question sought to be raised in the execution court, as to whether the property was a pension within the meaning of the Pensions Act and therefore not saleable, was substantially the same as had been already raised and decided in the suit itself and should, therefore, be no longer open to be raised in execution; but inasmuch as the decree was passed *ex parte* against the present objector he could apparently, under the authority of the Full Bench ruling in *Katwari v. Sita Ram Tiwari* (1), raise the question in the execution court.

Mr. A. M. Khwaja, for the appellant.

Mr. A. Dharam Das, for the respondent.

NIAMAT-ULLAH, J.:—This is an execution appeal by Syed Tahir Hasan, who objected in the court below to the execution of a decree obtained by the respondent, Lala Chander Sen, on foot of a mortgage deed executed by the appellant's parents and the appellant himself on

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21st March, 1921, in respect of proprietary right in, and the right to hold revenue free shares in, a number of villages described in the mortgage deed.

The objector appellant was a party to the suit in which the decree for sale of the mortgaged property was passed. The father of the appellant had died before the institution of that suit, which was brought against the other two executants, including the appellant, and certain subsequent transferees. The appellant did not enter appearance, and the proceedings were *ex parte* against him. His mother, however, contested the suit. She pleaded that the property to which the mortgage related was not transferable under the Pensions Act, XXIII of 1871, nor had the court any jurisdiction, without the Collector's certificate, to entertain the suit. Subsequently the plaintiff obtained the requisite certificate from the Collector and filed it. The written statement was amended, and it was pleaded that as the plaintiff (the mortgagee) was a stranger to the group of grantees, he could not maintain the suit in spite of the Collector's certificate. The court struck a number of issues, Nos. 2 and 3 of which ran as follows: "(2) Whether the property in suit is not transferable under sections 4, 6 and 12 of the Pensions Act of 1871? (3) Whether the suit is cognizable by this court without the Collector's certificate?"

The court decided both the issues in favour of the plaintiff and decreed the suit. A final decree was passed in due course, and the decree-holder applied for its execution. The present appellant then objected to the sale of the property, *inter alia* on the ground that under section 11 of the Pensions Act the court had no jurisdiction to sell the property which was of the nature described in the aforesaid section. The objection was disallowed in a very summary order which betrays want of appreciation on the part of the lower court as regards the nature of the objection and the questions thereby raised. The case was argued at considerable length

before us as if the entire controversy was of first impression.

The Pensions Act (Act XXIII of 1871) is described as "An Act to consolidate and amend the law relating to pensions and grants by Government of money or land revenue." Section 4 debars a civil court from entertaining any suit relating to "any pension or grant of money or land revenue conferred or made by the British or any former Government". Section 6, however, empowers such court to entertain such suits if the Collector grants a certificate that the case may be tried. As already stated, the mortgagee had obtained the certificate of the Collector; and assuming the suit for enforcement of the mortgage was a suit relating to any pension, etc., as alleged by the contesting defendant, the jurisdiction of the court to entertain and try it was saved by the Collector's certificate. No question can now arise in respect of the court's jurisdiction so far as it was affected by section 4 of the Pensions Act.

The contesting defendant had also pleaded that the property covered by the mortgage deed was not transferable in view of the provisions of section 12, which cannot be understood without reference to section 11. Both the sections may, therefore, be conveniently quoted in full. They run as follows:

"(11) No pension granted or continued by Government on political considerations, or on account of past services or present infirmities, or as a compassionate allowance, and no money due or to become due on account of any such pension or allowance, shall be liable to seizure, attachment or sequestration by process of any court in British India, at the instance of a creditor, for any demand against the pensioner, or in satisfaction of a decree or order of any such court.

"(12) All assignments, agreements, orders, sales and securities of every kind made by the person entitled to any pension, pay or allowance mentioned in section 11, in respect of any money not payable at or before the

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making thereof, on account of any such pension, pay or allowance, or for giving or assigning any future interest therein, are null and void."

As was pointed out by a Bench of this Court in *Lakhmi Chand v. Madho Rao* (1), section 4 is of wider scope than section 11 inasmuch as the latter refers to pensions, while the former refers not only to pensions but also to grants of money or land revenue.

One of the contentions put forward on behalf of the respondent in this Court is that the decision in the suit itself is a bar to the appellant's objection being heard so far as it involves the question whether the property covered by the mortgage deed is a pension within the meaning of section 11. It should be observed that section 11 had not been pleaded in the suit, nor could it be pleaded at that stage. That section forbids sale of a pension in satisfaction of a decree or order of any court. That stage arrived after the decree was passed. The question which could arise in the suit itself and was raised had reference to the powers of the mortgagor to make the mortgage, as to which provision is made in section 12 which declares "all assignments, agreements, orders, sales and securities of every kind by the person entitled to any pension . . . are null and void". It is contended on behalf of the respondent that the operation of section 12 depends entirely upon a consideration which is also a pre-requisite of the application of section 11, namely, that the property which the court is called upon to sell is "pension" within the meaning of section 11. Unless the property in question is a pension, neither section 11 nor section 12 can have any application. It may, therefore, be contended for the respondent that as the plea of the contesting defendant based on section 12 was rejected in the suit itself, it cannot be considered in execution proceedings, though the objector invokes the aid of section 11, and not of section 12. For a proper consideration of this part of the case it is necessary to-

(1) (1930) I.L.R., 52 All., 868(878).

quote the finding of the court on issue No. 2, which bore on the point. It is as follows: "There is no evidence to show that the revenue of any of the villages in question was assigned by any of the former rulers to any of the predecessors of the defendants. It appears that these villages were released by the Government as revenue free holdings between 1840 and 1842. There is nothing to show that these 'muafi' rights amount to a pension within the meaning of the Pensions Act. The villages in question were, it is stated by the defendant in her written statement, received by transfer from Muhammad Naqi. I find that they are not untransferable and decide the issue in the negative."

The line of argument adopted in this Court on behalf of the objector appellant is that the court had no jurisdiction to pass the decree for sale of the property which the law declares to be non-transferable, that it is always open to a party to establish by evidence that a certain decree is null and void for want of jurisdiction in the court passing it, that section 11 of the Civil Procedure Code does not in terms apply and that the general principles of the rule of *res judicata* did not preclude the appellant from raising a question which was not actually decided between the decree-holder and himself, and that in any view the court should refrain from doing what the law forbids.

I do not think that in the circumstances of this case it can be held that the decree sought to be executed was passed by a court which had no jurisdiction to pass it. The suit in which the decree was passed was brought on foot of a mortgage under order XXXIV, rule 4, Civil Procedure Code. Such a suit is cognizable by a civil court; and it cannot be denied that the court could pass a decree on foot of a mortgage which was not proved before it to be invalid. The real question in controversy in the suit was whether the mortgage sought to be enforced was valid. One of the defendants to that suit (not the present appellant) had impugned the mortgage

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as invalid on the ground that it related to property which was declared to be non-transferable by section 12 of the Pensions Act. The validity of the mortgage depended on proof of the fact whether the property was of the description given in the aforesaid section. The court having held on evidence that the property had not been proved to be of that description, the validity of the mortgage was affirmed and a decree could be passed. There is nothing in these circumstances which affects the jurisdiction of the court passing the decree. It cannot be said that a court which passes a decree on foot of a mortgage, which relates to non-transferable property and is therefore invalid, had no jurisdiction to pass it. Arriving at an erroneous decision on a question of fact or law, and acting without jurisdiction, are two different matters. If the court held erroneously that the property covered by the mortgage was not non-transferable, the utmost that can be said is that it acted on a wrong assumption in passing a decree. I am, therefore, of opinion that the decree in question in this case cannot be treated as a nullity for want of jurisdiction in the court passing it.

In view of what I have held above, it is not necessary for me to decide the general question whether it is open to a party to establish by evidence that the decree sought to be executed is null and void for want of jurisdiction in the court passing it. The question has been recently considered at considerable length by a Full Bench of this Court in *Cantonment Board, Muttra v. Kishan Lal* (1). The learned CHIEF JUSTICE, who delivered the leading judgment in the case, has expressed a very cautious opinion and confined himself strictly to the facts of the case before him. MUKERJI, J., is inclined to subscribe to the general rule that the court executing the decree cannot, in any case, go behind the decree. The third learned Judge who was a member of the Full Bench agreed with the conclusion arrived at by his colleagues

(1) (1934) I.L.R., 57 All., 1.

and did not express any opinion on that general question. In my opinion that case is no authority for the broad proposition that in no circumstances can a court executing the decree go behind it.

To my mind the question which we are called upon to decide is not whether the court passing the decree had jurisdiction to pass it; but whether the court executing the decree can sell the property. It may be contended that in so far as the decree of a competent court directs the sale of a certain property therein specified, the court executing the decree must sell it and not listen to objections to its own powers in that behalf. This contention cannot be allowed to prevail in view of the pronouncement of a Full Bench of this Court in *Katwari v. Sita Ram Tiwari* (1). In that case a decree for sale was passed on foot of a mortgage, and an objection was taken in the court executing the decree that the property to which the mortgage related was an occupancy tenure which the court was prohibited by law from selling. The Full Bench held that the court executing the decree was not competent to sell the occupancy tenure. The learned Judge who delivered the principal judgment observed as follows: "No doubt, it was not open to the judgment-debtor to contest the validity of the decree which was passed against him; but it was open to him to say to the court that as the law contains a mandatory provision which precludes a court executing a decree from selling an occupancy holding, the court was bound to carry out the provisions of the law and not to act in violation of those provisions."

It seems to me that the position is precisely the same in the present case, except in one respect which I shall presently discuss. It may not be open to the appellant to attack the validity of the decree. Indeed, I have held that the decree is a perfectly valid document so far as it goes; but it is certainly open to him to satisfy the court executing the decree that though it is called upon by

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the decree to sell the property, the law forbids it, and that if the sale takes place at the instance of the court it will be in violation of an express provision of law, namely section 11 of the Pensions Act XXIII of 1871, which declares that a certain kind of property shall not be sold "in satisfaction" of a decree or order of any such court. The section is wide enough to include cases where the property is to be sold in execution of a mortgage decree and cannot be limited to cases of simple money decrees. It draws no distinction between a case where the property is directed to be sold by a decree or is directed to be sold in pursuance of an attachment made by the order of a court. As was observed in *Katwari v. Sita Ram Tiwari* (1), already referred to, by BANERJI, J., who delivered the judgment of the Court: "Section 20, clause (2), of the Agra Tenancy Act distinctly prohibits a court from transferring an occupancy holding in execution of a decree. It seems to me to be immaterial whether the decree ordered sale or whether it was a simple money decree. What the decree-holder is now seeking is to sell an occupancy holding in execution of his decree. This is prohibited by the provisions of section 20, and the court executing the decree is bound to carry out the mandatory provision of the section." In the latest Full Bench case, *Cantonment Board, Muttra v. Kishan Lal* (2), the learned CHIEF JUSTICE after referring to that case, expressed the following opinion: "It therefore seems that the *ratio decidendi* of that Full Bench case was that where there is some statutory enactment which prohibits the sale of some property, then it is the duty of the executing court to refuse to sell it, even though a decree has been passed by another court. When an execution court refuses to execute it, it is not really holding that the decree was passed without jurisdiction or is not really setting aside the decree, but is merely staying its hands from proceeding further, because it is itself prohibited by law from selling the property. There

(1) (1921) I.L.R., 43 All., 547.

(2) (1934) I.L.R., 57 All., 1(11).

may accordingly be cases where the decree is incapable of execution or is void and a nullity, in such a way as to make it impossible for the executing court to execute it; or there may be cases where there are certain statutory provisions which prevent the executing court from proceeding to sell certain property, for instance, where the sale of certain lands is prohibited, and not necessarily their attachment and order for sale. In such cases it may be possible for the court in one sense to go behind the decree and not execute it; but in reality the court is merely staying its own hands and not inquiring into the jurisdiction of the court which passed the decree."

I find myself in entire agreement with the views expressed in these passages, which do not in any way call in question the correctness of the decision in *Katwari v. Sita Ram Tiwari* (1). MUKERJI, J., has expressed some vague doubt about the soundness of the view taken in that case, for he says (page 14): "With all respect, I have some doubt in my mind as to the correctness of this decision; but it is not really necessary to doubt the correctness. Even if it be a correct decision, the learned Judge who delivered the judgment and the two learned Judges who agreed with that judgment expressly held that an executing court could not go behind the decree. The reason for non-execution of the decree in its terms was not existent within the decree or was not existent in the want of jurisdiction on the part of the court passing the decree, but resided in a rule of law which stood apart from the decree." Even this reasoning is applicable to the circumstances of this case.

It was not disputed in *Katwari v. Sita Ram Tiwari* (1) that the property to be sold was an occupancy tenure; whereas in the present case the fact that the property is of the description mentioned in section 11 of the Pensions Act is in controversy. The question is whether the court is bound to refuse to hear evidence which is

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(1) (1921) I.L.R., 43 All., 517.

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offered to show that the property is one the sale of which is prohibited by section 11 of the Pensions Act. In my opinion the court must ascertain the truth of the allegation that it has no jurisdiction to sell the property which it is required to sell. The only bar that can be suggested is that of *res judicata* arising from the finding of the court in the suit that it was not shown by the contesting defendant that the property is non-transferable. Where the jurisdiction of a court is challenged, it cannot refuse to inquire into questions on which its jurisdiction depends. The rule of *res judicata*, as contained in section 11 of the Civil Procedure Code, does not in terms apply except where the plea is taken in a suit. The general principles of the law of *res judicata* are, however, applicable to execution proceedings. The appellant had not contested the suit, and the decree against him was *ex parte*. His co-defendant had raised the question, but failed to establish her allegation. Apart from any bar which may exist as between the decree-holder and the appellant in consequence of the latter not having raised the question in the suit though he might or ought to have done so, the finding actually recorded between the decree-holder and another defendant cannot, in my opinion, be *res judicata* between the parties.

The next question is whether, in applying the general principle of *res judicata*, the terms of explanation IV to section 11 are applicable, and the fact that the appellant might and ought to have raised the question (assuming he could have raised it—a point which I will discuss later) precludes him from raising the question now. There is considerable difference of opinion on this question. There is, however, little divergence of opinion so far as the authorities of this Court are concerned. It has been held that the rule of constructive *res judicata*, as embodied in explanation IV to section 11 of the Civil Procedure Code, does not apply to execution

proceedings: *Rup Kuari v. Ram Kirpal* (1), *Kalyan Singh v. Jagan Prasad* (2), *Sheo Mangal v. Mt. Hulsa* (3) and *Ram Charan Sahu v. Salik Ram Sahu* (4). In some cases the Calcutta High Court has taken the same view, e.g., *Umed Ali v. Abdul Karim* (5). There is yet another ground on which it can, in my opinion successfully, be contended that the appellant is not barred. The question directly and substantially in issue in the previous case was whether the mortgage deed was invalid; whereas the question now before the court is whether the court has power to sell the property. The power of the court to sell was not directly and substantially in issue in the suit.

Moreover, I think it was not open to the appellant to prove in the suit that the property was not transferable. He had himself mortgaged the property, representing to the mortgagee that he had the power to mortgage and that the property was such that could be mortgaged. He was estopped from derogating from his own grant and from pleading that his representation, on which the mortgagee advanced the money, was incorrect. This has been repeatedly held by this Court: See, for instance, *Muhammad Muzamil-ullah Khan v. Mithu Lal* (6) and *Bishumbhar Dayal v. Parshadi Lal* (7). In a case like this the mortgagor may well consider it futile to contest the mortgagee's suit. It cannot, in my opinion, be rightly said that he is likewise estopped from objecting to the court selling the property. To hold otherwise will be to create a very anomalous position. Where a person mortgages property which the law prohibits the court from selling, he cannot be heard to plead, when a suit is brought on foot of the mortgage, that the property is inalienable, as he is estopped; and when the court proceeds to sell the property in execution of decree, he is told that he might and ought to have raised the question

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(1) (1880) I.L.R., 3 All., 141(143).

(2) (1915) I.L.R., 37 All., 589.

(3) (1921) I.L.R., 44 All., 159.

(4) (1929) I.L.R., 52 All., 217.

(5) (1908) I.L.R., 35 Cal., 1060.

(6) (1911) I.L.R., 33 All., 783.

(7) (1912) 10 A.L.J., 112.

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in the suit itself. It is true in some cases a mortgagor may not be estopped, if it is found that the mortgagee was aware of the character of the property; but in a majority of cases this is not so. The mortgagor in such cases makes a representation as regards a fact, namely, that the property is alienable. It is not a case of inherent disability, as in cases of mortgages by a minor or a disqualified proprietor, in which estoppel, being against statute, does not apply.

In the present case the mortgage deed mentions two distinct rights in the shares which the mortgagors are said to have possessed; the proprietary right, and their right to hold the same revenue free. It is possible that, so far as they may be grantees of the revenue, the property may be of the description mentioned in section 11, Pensions Act, and the rest may not be of that description.

In all the circumstances of the case and for the reasons discussed above, in my opinion the lower court should have given an opportunity to the appellant to establish that the property, or some incidents thereof, cannot be sold in execution of decree. Accordingly, I would remit the following issue to the lower court: "Whether the property sought to be sold by the decree-holder is such property as is declared incapable of sale by section 11, Pensions Act XXIII of 1871."

RACHHPAL SINGH, J.:—I agree. I would, however, like to add that it is with a considerable amount of hesitation that I have come to this conclusion. It appears to me that no other course is open to us in view of the opinion expressed in some of the cases decided by this Court. I would, however, like to make a few observations in connection with the case before us.

The facts of the case are set forth in the order of my learned brother, and it is, therefore, unnecessary to repeat them.

Cases in which judgment-debtors may raise a plea in the execution department that courts executing decrees

can not sell properties sought to be sold may come under the following three categories:

1. Where want of jurisdiction in the court which passed the decree is patent on face of the record.

2. Where a plea of want of jurisdiction had been taken at the time of the trial and the court decided the point against the defendant after considering the evidence produced in the case in respect of the plea of want of jurisdiction.

3. Where a defendant has not entered appearance and an *ex parte* decree has been passed against him.

I will, at first, take up the case in which want of jurisdiction in the court which passed the decree appears on face of the record. "By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited." (Halsbury's Laws of England, and Edition. Volume 8, article 1176, page 531.) It should also be borne in mind that it is a fundamental rule of law that a judgment of a court without jurisdiction is a nullity. It is well settled that "Where by reason of any limitation imposed by statute, charter, or commission, a court is without jurisdiction to entertain any particular action or matter, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the court." (Halsbury, Volume 8, article 1178, page 532.) This is also the view which has been accepted in some of the American cases which are cited in Hukm Chand's Law of Res Judicata, pages 398 and 399: "In *Elliott v. Peirsol* TRIMBLE, J., said that if a court should 'act without authority its judgment and orders are regarded as nullities. They are not voidable but simply void, and form no bar to a recovery sought, even prior to a reversal

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in opposition to them. They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law as trespassers'. In *Holmes v. Eason* the Tennessee Supreme Court said: 'A void judgment is, in legal effect, no judgment. It neither binds nor bars any one. All acts performed under it, and all claims derived from it, are void. Parties attempting to enforce it are trespassers . . . No action is required to revoke it; it is null in itself. The nullity ought, therefore, to appear on its face.'

If the case of *Cantonment Board, Agra v. Kanhaiya Lal* (1) is considered in this light, then, I would say, with all respect, that it was correctly decided. Where a judgment is passed without jurisdiction, it would be wrong to hold that the judgment-debtor cannot show in the execution proceedings that it is wholly null and void. The condition precedent, however, is that the nullity should appear on the face of it. Take the following instance. The revenue courts are courts of limited jurisdiction and have no power to pass a simple money decree (except in case of rent due) or a mortgage decree. Suppose a tenant creates a mortgage of his tenancy. The mortgagee goes to rent court and asks for a decree for sale of mortgaged tenancy land. The court passes an *ex parte* decree against the defendant. In such a case it will be certainly within the competence of the court executing the decree not to execute it for the simple reason that it was without jurisdiction. In the words of the CHIEF JUSTICE in *Cantonment Board, Muttra v. Kishan Lal* (2): "Prima facie a court, which has no jurisdiction to entertain a claim, cannot by seising the case usurp jurisdiction and then by deciding that it has jurisdiction make its decision binding on the defendant."

Coming to the second class of cases we find that the position is somewhat different. The question which arises in such cases is this. Can a defendant, who takes the plea of want of jurisdiction, raise the same plea in

(1) [1933] A.L.J., 162.

(2) (1934) I.L.R., 57 All., 1(5).

execution department when in the regular suit, after evidence has been recorded in respect of the plea, that point has been decided against him? For instance, in the case before us Mst. Madina, one of the mortgagors, had contested the suit. She had taken a plea that the mortgage was invalid as it offended against the provisions of sections 4, 6 and 12 of Act XXIII of 1871 (Pensions Act). The court framed an issue in respect of this plea. The parties produced evidence and then the point was decided against Mst. Madina. If she had come forward in the execution department and had raised the plea that the mortgaged property was not liable to be sold because of the provisions of the Pensions Act referred to above, then I would have been prepared to hold that she was incompetent to take such a plea. The reasons for this are very lucidly stated in *Wright v. Douglass* cited in Hukm Chand's Law of Res Judicata at page 440, and are as follows: "The want of jurisdiction may always be shown by evidence, except in one solitary case, that is, when jurisdiction depends on a fact that is litigated in a suit, and is adjudged in favour of the party who avers jurisdiction, then the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence of jurisdiction, until set aside or reversed by a direct proceeding." In a large number of cases noticed in Hukm Chand's Law of Res Judicata at pages 474 and 475 the view expressed is that where a court has jurisdiction, it has a right to decide every question which occurs in the case, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. The reason for the rule has thus been stated in *Voorhees v. United States Bank*, cited in Hukm Chand at page 474: "The error of the court, however apparent, can be examined only by an appellate power; and by the laws of every country a time is fixed for such examination, whether in rendering judgment, issuing execution, or enforcing it by process of sale or imprisonment . . . If that time elapses, common justice requires

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that what a defendant cannot directly do in the mode pointed out by law, he shall not be permitted to do collaterally by evasion. A judgment irreversible by a superior court cannot be declared a nullity by any authority of law. If after its rendition it is declared void for any matter which can be assigned for error, only on a writ of error or appeal, then the said court not only usurps the jurisdiction of an appellate court, but collaterally nullifies what such court is prohibited by express statute law from even reversing. If the principle once prevails that any proceeding of a court of competent jurisdiction can be declared to be a nullity by any court after a writ of error or appeal is barred by limitation, every county court or Justice of the Peace in the Union may exercise the same right, from which our own judgments or process would not be exempt."

It appears to me, if I may say so with respect, that the same view is expressed by the CHIEF JUSTICE in *Cantonment Board, Muttra v. Kishan Lal* (1), where he observed: "But to hold that an executing court must always inquire into the question of the jurisdiction of the court which passed the decree would be to re-open matters which might have been the subject of the controversy in the original suit and which might well have been decided on a consideration of the oral and documentary evidence. Such questions may be mixed questions of law and fact, for example, as to the place where the cause of action arose, the place where the contract was broken, the sub-division in which the property in dispute was situated, the nature and character of land as to whether it is saleable or not and the validity of certain transfers. All such questions are, properly speaking, questions which arise for consideration in the suit itself and which have to be determined on an examination of the evidence on the record. It would be too much to lay down that the executing court can go behind these findings and re-open

(1) (1934) I.L.R., 57 All., 1(11).

the question and determine afresh that the civil court decided this question wrongly and, therefore, improperly usurped jurisdiction."

In the case of *Cantonment Board, Muttra v. Kishan Lal* (1) it was held that: Where a suit filed in the civil court is, under the Agra Tenancy Act, 1926, cognizable by the revenue court alone, but no objection as to jurisdiction is taken or if taken is disallowed, and no appeal is preferred from the judgment to the District Judge, nor there is further remedy sought from the High Court, it is not open to the defendant in the suit to raise the question of jurisdiction in the execution department and contend that the civil court had no jurisdiction to entertain the suit at all. The principle of this ruling would have been clearly applicable to the case before us if Mst. Madina had come forward and had raised a plea that the property was not liable to be sold on account of the provisions of the Pensions Act. In *Kalipada Sarkar v. Hari Mohan Dalal* (2), at page 638 the following observations were made: "the safest course to follow is to adhere rigidly to the established principle that every order and judgment, however erroneous, is, in the words of Lord COTTENHAM in *Chuck v. Cremer*, good until discharged or declared inoperative; and that the execution court cannot inquire into the validity or propriety of the decree. This, no doubt, assumes that there is a valid decree in existence, that is, an adjudication by a court of justice, a decree or order which has not ceased to be operative and is capable of execution."

On behalf of the appellant reliance was placed on a Full Bench ruling of the Calcutta High Court, *Gora Chand Haldar v. Prafulla Kumar Roy* (3). I have perused the case and I think that it is distinguishable from the case before us. The head note of that ruling runs thus: "Where a decree presented for execution was made by a court which apparently had not jurisdiction, whether pecuniary or territorial or in respect of the

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(1) (1934) I.L.R., 57 All., 1.

(2) (1916) I.L.R., 44 Cal., 627.

(3) (1925) I.L.R., 53 Cal., 166.

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judgment-debtor's person, to make the decree, the executing court is entitled to refuse to execute it on the ground that it was made without jurisdiction. Within these narrow limits, the executing court is authorised to question the validity of a decree." I would place this case in the first category, as being one in which the decree was null and void because the court granting the decree had no jurisdiction and that fact appeared on the face of the record. A court has jurisdiction both to decide every question which occurs in the case as well as its judgment, until reversed, is regarded as binding in every other court. I may point out here that in the Calcutta case it was conceded that the executing court will not be entitled to question the jurisdiction of the court passing a decree, where facts have to be investigated. I quote the arguments on this point from the above mentioned Calcutta ruling:

"Where there is an apparent nullity, the executing court can certainly question the lack of inherent jurisdiction and refuse to proceed. Where, however, facts are to be investigated, the matter is different." If it be considered that the learned Judges who decided the above mentioned case intended to lay down that the court executing a decree can permit the judgment-debtor to take the plea that the court passing the decree had no jurisdiction, even after that point had been heard and decided against him in the original suit, then I most respectfully beg to dissent from that view. The view expressed in the Full Bench ruling in *Gora Chand Halдар v. Prafulla Kumar Roy* (1) was dissented from in a Full Bench ruling of this Court, *Cantonment Board, Muttra v. Kishan Lal* (2).

In the case before us *Mst. Madina*, who defended the suit, raised a plea that the mortgage was invalid because it related to properties which could not be mortgaged in view of the provisions of the Pensions Act. This was denied by the plaintiff and an issue was framed. The decision of the question depended on the evidence

(1) (1925) I.L.R., 53 Cal., 166.

(2) (1924) I.L.R., 57 All., 1.

which could have been produced in the case by the parties. Evidence was produced and the court gave a definite finding that the plea was not established. Under these circumstances I am clearly of opinion that Mst. Madina could not have been allowed in the execution department to reagitate the same question which had been decided against her. It is said that when a defendant in a case like this raises the plea which has been decided against him in the former suit, he is not asking the court to hold that the decree was invalid but he is asking that owing to the statutory bar the property is not liable to be sold. I personally see no difference between the two cases. In reality he is asking that he should be permitted to reagitate the same plea which has been rejected in the regular suit and to produce evidence to show that the judgment which has otherwise become final was wrong. In view of the decision in *Cantonment Board, Muttra v. Kishan Lal* (1) he cannot be permitted to take this course. When the judgment-debtor says in a case like this that he is only asking the court not to execute the decree because of some statutory prohibition, then the simple reply to this would be that the plea is no longer open to him. He will be told that the question as to whether or not the property was liable to be sold in view of some statutory bar has already been decided against him finally, and it has already been held that the property is saleable and so the same question cannot be permitted to be raised a second time. When we say that the question of jurisdiction can be raised at any time, all that it means is that it can be raised by way of appeal or otherwise in the course of proceedings of the court whose jurisdiction is questioned. Caspersz in his *Law of Estoppel*, fourth edition, page 683, section 830 says: "It was commonly said that a question of jurisdiction may be raised at any time, but as pointed out in *Narc Hari v. Anpurnabai* (2) the question must be raised by way of appeal or otherwise in the course of the proceed-

(1) (1934) I.L.R., 57 All., 1.

(2) (1874) I.L.R., 11 Bom., 160,  
Foot-note.

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ings of the court whose jurisdiction is questioned. In that case Anpurnabai was held to have acquiesced in the irregularity and was debarred from raising the question of jurisdiction after the proceedings were carried to completion."

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Now I come to the third class of such cases. Cases coming under this head may be of two descriptions. There may be cases in which there was only one judgment-debtor, who did not appear to defend the suit. The other class may consist of cases in which some of the judgment-debtors raised the plea of want of jurisdiction but it was decided against them, while the other judgment-debtors did not appear to defend the suit. In *Katwari v. Sita Ram Tiwari* (1) it was held that where a mortgage decree had been passed for the sale of an occupancy holding, it was open to an executing court to go behind the decree and to hold that it could not be executed in view of the provisions of section 20, clause (2) of the Tenancy Act. The view expressed in this case certainly supports the contention of the appellant. In that case an *ex parte* decree on foot of a mortgage deed had been obtained. I may be permitted to remark that the facts of that case were somewhat different from the facts of the case before me. In that case the mortgage deed itself recited that the property mortgaged was an occupancy holding, in other words it appeared on the face of the record that the decree had been passed by a court which had no jurisdiction in view of the statutory bar enacted by section 20 of the old Agra Tenancy Act. On the other hand in the case before us the statutory bar can only arise if the appellant who had not appeared to defend the suit is able to prove by producing evidence that the provisions of the Pensions Act are applicable to the property sought to be sold. In another recent ruling, *Sukhdeo v. Dongar* (2), a Bench of two learned Judges of this Court has held that even if an occupancy holding has been mortgaged and a decree for its sale has

(1) (1921) I.L.R., 43 All., 547.

(2) [1935] A.L.J., 490.

been obtained, objection can still be raised in the execution department that the property is not saleable in execution of the decree and the execution court would be bound to decline to sell it. When we read the three rulings, *Katwari v. Sita Ram Tiwari* (1), *Cantonment Board, Muttra v. Kishan Lal* (2), and *Sukhdeo v. Dongar* (3), it appears that the following two propositions have been laid down:

(1) Where a suit filed in the civil court is, under the Agra Tenancy Act, 1926, cognizable by the revenue court alone, but no objection as to jurisdiction is taken or if taken is disallowed, and no appeal is preferred from the judgment to the District Judge, nor there is further remedy sought from the High Court, it is not open to the defendant in the suit to raise the question of jurisdiction in the execution department and contend that the civil court had no jurisdiction to entertain the suit at all.

(2) If a defendant, however, does not appear and *ex parte* decree is passed against him, then it is open to him to raise the question of jurisdiction in the execution department which he could have raised at the trial.

Somewhat anomalous position may arise in a case where there are two or more defendants. Take the instance of the case before us. Mst. Madina had taken a plea in the trial court that the mortgage was invalid because of the provisions of the Pensions Act. An issue was framed and was decided against her. If she had now come forward to take the same plea in the execution department, then, according to the rule expressed in *Cantonment Board, Muttra v. Kishan Lal* (2), she could not have been permitted to reagitate the same question. But as the appellant had not appeared in the trial court and the decree passed against him was *ex parte*, so according to the view expressed in *Katwari v. Sita Ram Tiwari* (1) and *Sukhdeo v. Dongar* (3) it is still open to him to raise the plea that the property cannot be sold. The results are

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(1) (1921) I.L.R., 48 All., 547. (2) (1934) I.L.R., 57 All., 1.  
(3) [1935] A.L.J., 490.



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somewhat curious. In the same case one defendant is not permitted to take a plea on the ground that the question has already been decided against him after contest. At the same time the other defendant is permitted to raise the same plea which had been decided against his co-defendant after contest. It may be that the defendant who is allowed to take the plea in execution department may succeed in establishing his point. The result of this may be that even the share of the other defendant against whom the decree was passed after contest may not be sold in the execution department on the ground that the property could not have been mortgaged or sold in view of the provisions of the Pensions Act. Thus there would be two contrary findings in one and the same case. At the trial the decision may go against the defendant while in the execution department it may go against the plaintiff. It appears to me that this state of things is unsatisfactory and requires reconsideration. My personal opinion is that the correct rule which should be applied to cases of this description is that "The want of jurisdiction may always be shown by evidence except in one solitary case, that is, when jurisdiction depends on a fact that is litigated in a suit, and is adjudged in favour of the party who avers jurisdiction, then the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence of jurisdiction, until set aside or reversed by a direct proceeding." If the question were still an open one I would hold that in a case where there are two defendants and one of them takes the plea of want of jurisdiction and it is decided against him, then in view of explanation IV, section 11 the matter should be deemed to have been decided not only against the defendant who appeared to contest, but also against the other defendants who failed to appear. It is true that section 11 does not in terms apply to the execution proceedings in a suit inasmuch as each of such proceedings is not a separate suit but is only a proceeding in the same suit. But I think that the

general principles of *res judicata* should be applicable to such proceedings. It, however, appears to me that so long as the view taken in the Full Bench ruling in *Katiwari v. Sita Ram Tiwari* (1) is not reconsidered, it is binding on us. It is under these circumstances that I have felt bound to agree with the order proposed by my learned brother.

BY THE COURT:—We remit the following issue to the lower court: Whether the property sought to be sold by the decree-holder is such property as is declared incapable of sale by section 11, Pensions Act (Act XXIII of 1871).

Findings shall be returned in three months. Ten days shall be allowed for objections. Parties shall be at liberty to produce evidence.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and  
Mr. Justice Bennet

MIRU AND OTHERS (DEFENDANTS) *v.* RAM GOPAL  
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*Easement—Customary right—Public right—Right to offer prayers in another person's land—Dedication as mosque or wakf—Presumption from long user—Easements Act (V of 1882), sections 2, 18.*

A right to perform religious worship over the land of another may depend on a grant, or be acquired as a private easement by the owner of a dominant tenement. But in addition to such individual rights, a right of worship may also be acquired as a customary right, or may be claimed as a part of a public right, which would be a right vested in an entire community. The latter, under section 2 of the Easements Act, is excepted from the operation of that Act.

If a person holds a mere license, he is not entitled to vary the user so as to claim a higher right than what was granted; so, where there is merely a right to perform worship or offer prayers on a piece of land, he would not be entitled to put up a building on it for the purpose of performing worship or prayers therein. But where a mosque or a temple has stood on a piece of land for a long time and worship has been performed in it by the public all that time, and the terms of the

\*Appeal No. 26 of 1934, under section 10 of the Letters Patent.

(1) (1921) I.L.R., 43 All., 517.

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original grant of the land are not now ascertainable, there would be a fair presumption that the site on which the mosque or temple stands is dedicated property and consecrated land and that the building does not stand there merely by the leave and license of the owner of the site. There is nothing legally objectionable in the owner of a land making a grant of the site to persons of a different community and creed and then allowing them to consecrate that site by building a place of worship on it; there can be no objection to such a building being changed from katcha to pucca later on; it is no longer a case of a mere license.

Messrs. *M. A. Aziz* and *Ishaq Ahmad*, for the appellants.

Messrs. *G. S. Pathak* and *S. K. Mukerji*, for the respondent.

BENNET, J.:—This is a Letters Patent appeal by the defendants from the judgment of a learned single Judge of this Court. The plaintiff is the sole zamindar of a certain mahal and in his plaint he sets out that Rahim Baksh formerly occupied a khasra plot No. 119 in the abadi and Rahim Baksh made a katcha platform on the said plot for offering prayers, and that this was the condition of affairs at the time of the partition in 1904, that there was no pucca or katcha mosque in the said plot, and that the defendants now desire to make a pucca mosque on the plot. The plaintiff therefore asked for an injunction against the defendants to restrain them from constructing any katcha or pucca mosque in this plot. The written statement alleged that there had always existed a katcha mosque on the plot in question, that in the last rainy season before the suit, which was brought in 1929, the mosque required repairs and the defendants demolished the mosque and dug up the foundations and desired to rebuild it with the katcha bricks but the Hindus objected to bricks being used from their tanks and accordingly the defendants brought pucca bricks from Saharanpur. It was claimed in paragraph 8 that contesting defendants have a right to build a mosque in a pucca manner, that the site of the

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mosque cannot be the property of the plaintiff or any one else, that it is wakf property and that every Muhammadan has a right to make a pucca mosque in place of a katcha mosque. The trial court framed the issue whether any katcha mosque has been in existence on plot No. 119 and it found in the negative. The lower appellate court reversed the finding on this issue and held that "in my opinion . . . the mosque existed in the year 1904". The finding was that there had been originally a raiyat Rahim Baksh in the house and he had left the house and gone to another house and that the house had been used as a place of worship by the Mussalmans of the village for more than 30 years, that Rahim Baksh had died 10 or 11 years before the suit, that various constructions had been made to adapt the house to a mosque during the time it was a katcha mosque, that is, there was a room and in front a thatched verandah and a platform with a pucca drain and *hammam* for heating water and a bath room and a lavatory and a hand tube well. The lower appellate court inspected the spot and came to a careful finding of fact on the issue before it.

Considerable argument has been made as to the correctness of that finding and the learned single Judge of this Court set the finding aside and held that the facts known would not result in the finding that there was a mosque. The learned Judge observed: "I am satisfied that the decision of the lower appellate court can not be supported." We find that the lower appellate court based its finding on not only the oral evidence produced by the parties but also certain documentary evidence. This documentary evidence consisted of three documents, firstly, there was a khasra Ex. A of the year 1311 Fasli (1903-04). This khasra states that plot No. 119 was entered as "masjid". During the partition the usual partition proceedings were drawn up under section 114 of the Land Revenue Act detailing how the partition is to be made. In this partition proceeding

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at a certain place, following what is laid down in section 121, there was a note in regard to places of worship and burial grounds. The partition proceeding entered that there was a mosque, and this entry was crossed out by a line and it was stated that on this No. 119 was a chabutra for the purpose of prayers. Considerable argument was made by learned counsel for the plaintiff in regard to this entry, but it should be noted that where the entry is made at all in this portion of the partition proceedings the entry must be one in regard to section 121 of the Land Revenue Act which deals with places of worship and burial grounds. As the number is not a burial ground it must come into the other category of a place of worship. The defendants were tenants in the village and they were not parties to the partition proceedings. On the other hand, plaintiff's predecessor was a party to the partition proceedings. All the co-sharers in the partition proceedings were Hindus. In the particular *qura* which was formed for the plaintiff, Ex. D, there is this No. 119 shown again as masjid, that is in the year 1907. The plaintiff's predecessor, therefore, consented to the entry in his *qura* of this No. 119 as masjid. If he had had an objection to that entry, he could have made an application to the court under section 111 of the Land Revenue Act. The fact that he did not make any objection to the entry shows that he acquiesced in the entry. On this evidence we consider that the lower appellate court had sufficient grounds to come to the finding of fact at which it arrived. That finding of fact is that the number in question has been used since before the partition in 1904 for the purpose of a mosque.

We now come to the legal arguments on the point. Learned counsel for the respondent argued that the Easements Act, chapter VI, should apply and that the question was merely one of license under chapter VI, and that in this case under section 60 the zamindar could revoke the license. He argued that the case did not

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come under section 60, because there was no transfer of property under sub-section (a) and that under sub-section (b) the katcha building was not a work of a permanent character. He referred to the ruling in *Basa Mal v. Ghayas-uddin* (1). That was a case in which a tenant had a certain shed in his yard outside his house and the tenant allowed the Muhammadans of the village to use this for purposes of prayer. The tenant himself then erected a permanent building on the site of the temporary shed, and the tenant described the permanent building as a mosque. The zamindars sued for demolition. This Court laid down that the claim of the zamindars was well founded. The case is easily distinguishable from the present case because in the present case there is a finding that the plot has long been used for a mosque and that the use has been by the Muhammadan inhabitants of the locality and not merely by a particular tenant who allowed other people to come there for the purpose of prayer. Further, in the ruling in question there was a condition in the *wajibularz* that a tenant should not build a new house outside the compound of his dwelling house without the zamindar's permission. The ruling laid down that a tenant might make a dwelling within his compound but that in the case of the erection of a mosque which would by dedication become vested in the religious body for whose observance it was used, the contention of the defendants was unsound. The present case also differs because in the ruling there had been no mosque until the erection was made which was the cause of the suit. In the present case the finding is that since 1904, and before it, there has been a mosque on the site. We do not think therefore that the ruling has any bearing on the present case. A reference is also made to the case of *Fuzlur Rahaman v. Anath Bandhu Pal* (2). That was a case for specific performance of a contract by a Hindu to dedicate certain property for the maintenance of a

(1) (1904) I.L.R., 27 All., 356.

(2) (1911) 16 C.W.N., 114.

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mosque. The property was at the time in the hands of a receiver. There is always a discretion for the court to grant or withhold specific performance and the court acted apparently in the exercise of this discretion and held that it was not for a lawful purpose. Learned counsel argued at considerable length that a Hindu zamindar could not lawfully dedicate land for a mosque. We do not think that any difficulty exists of that nature in the present case. It is not stated that the zamindar dedicated the property for the mosque. It is stated that the zamindar allowed the defendants to dedicate the building as a mosque by their user of the building for the purpose of a mosque with the consent, express or implied, of the zamindar. The case is somewhat similar to that of *Sheo Raj Chamar v. Mudeer Khan* (1) where it was held by a Bench of which one of us was a member that in the case of a land being used as a graveyard from time immemorial, there was a presumption of the consent by the Hindu zamindars. It has also been held by their Lordships of the Privy Council in the case of the *Court of Wards v. Ilahi Bakhsh* (2) that a graveyard by user became wakf. We do not think that the provisions of the Easements Act or of any part of chapter VI in regard to license apply where a zamindar allows the Muhammadan population to use a building as a mosque. The provisions in chapter VI appear to us altogether inconsistent. In such a case we consider that where there is a finding that a mosque exists, this necessarily implies that there is no longer any question of easement or of license. Under the Muhammadan law the mosque is the property of God and not the property of the zamindar. Learned counsel for the plaintiff objected that there was no case of a transfer such as is necessary for transfer of property, but we consider that the consent of the zamindar to the use of a building as a mosque is sufficient. We note that it is specially provided in section 2, sub-section (b), of the

(1) (1934) I.L.R., 57 All., 166.

(2) (1912) I.L.R., 40 Cal., 297.

Easements Act that there is nothing in that Act which will affect any customary or other right, not being a license in or over immovable property, which the Government, the public, or any person, may possess in respect of other immovable property. That is, the Act deals with certain cases of easements which are connected with the property of the persons who enjoyed the easement and section 18 recognizes the case of easements which may be acquired by virtue of local custom, but besides those provisions of the Act there are customary and other rights in or over an immovable property which are not affected by the Act. We consider that the case of a mosque does not come under the Easements Act and that it is one of those cases which are excepted by section 2. This appears to be the correct method of dealing with the property which is used for a mosque and we do not consider that such property can be dealt with satisfactorily in any other manner. Under these circumstances we consider that the appeal should be allowed and we allow this Letters Patent appeal with costs and restore the judgment of the lower appellate court.

SULAIMAN, C.J.:—I agree and would like to add a few words only on the question of law which has been raised as to the nature of the right claimed in this case.

It is quite obvious that if a person holds a mere license, he is not entitled to vary the user so as to claim a higher right than what was granted. A right to perform any religious worship whether claimed by a Hindu, Muhammadan or Christian over the land of another may depend on grant, if so claimed by the grantee. It may also, if claimed by an individual, be acquired as a private easement, provided he is the owner of a dominant tenement. But in addition to such individual rights, a right of worship may also be acquired as a customary right which can be availed of by a large body of persons by virtue of such custom. Again, a right to perform worship may be claimed as a part of

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a public right, which, of course, would be a right vested in an entire community. Under section 2 of that Act, these last two classes of rights would be saved from the provisions of the Indian Easements Act. But where there is merely a right to perform worship, e.g. to offer prayers, such a right would not authorise the persons entitled to it to put up a building on the land in order to make it more convenient for them to perform the same worship.

But where a building has stood on a piece of land for a long time and the worship has been performed in that building, then it would be a matter of inference for the court which is the Judge of facts, as to whether the right has been exercised in that building for such a sufficiently long time as to justify the presumption that the building itself had been allowed to be consecrated for the purpose of such rights being performed. Where there is a mosque or a temple, which has been in existence for a long time and the terms of the original grant of the land cannot now be ascertained, there would be a fair presumption that the sites on which mosques or temples stand are dedicated property. There can be no legal impediment to such a dedication, as the owner of the land can make a grant of the site even to persons of a different community and creed, and allow them then to dedicate that site by building a place of worship on it. Where therefore the court finds that a mosque or a temple has stood for a long time and worship has been performed in it by the public, it is open to the court to infer that the building does not stand there merely by the leave and license of the owner of the site, but that the land itself is a dedicated property and the site is a consecrated land and is no longer the private property of the original owner. There is nothing legally objectionable in non-Muslim owners making a grant of a land to Muslims and in that way to enable them to build a mosque on such land, just as it would not be legally objectionable for Muslims to

make grants of lands to persons belonging to other religions, which the latter may utilise for the purpose of building houses of worship. In the case of graveyards, it has been held in several cases that long user justifies the inference that the land itself is a dedicated or consecrated property, or that even if it is not dedicated, it has become wakf property. The presumption would be all the greater in the case of a building which is used as a mosque or a temple.

If the finding merely were that there is a right to perform worship on a piece of ground, there would, of course, be no right to put up a pucca building on that land for such a purpose. But if the finding is that there is already a mosque or a temple on the land, though the structure is katcha, the necessary inference would be that the site has become a consecrated and dedicated property; and then there can be no objection to the building being converted into a pucca building. It is no longer the case of a mere license which cannot be exceeded beyond the terms on which it was granted. I, therefore, concur in the order proposed by my learned brother.

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## REVISIONAL CRIMINAL

*Before Justice Sir Charles Kendall*

EMPEROR v. BHAGWAN DAS\*

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April, 3

*Criminal Procedure Code, sections 200, 202—Failure to examine the complainant—Police inquiry into complaint ordered by Magistrate—Dismissal of complaint on police report—Prosecution of complainant for false charge—Jurisdiction.*

The wording of the proviso to sub-section (1) of section 202 of the Criminal Procedure Code makes it clear that the Magistrate has no jurisdiction to direct an investigation by the police into the truth or falsehood of a complaint until he has examined the complainant on oath under section 200. His

\*Criminal Revision No. 70 of 1935, from an order of R. L. Yorke, Sessions Judge of Meerut, dated the 21st of January, 1935.

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omission to take this necessary step vitiates the whole of the proceeding.

So, where without examining the complainant on oath the Magistrate ordered a police inquiry and upon receiving the police report dismissed the complaint and directed a complaint under section 182 of the Penal Code to be made against the complainant, it was *held* that the Magistrate's proceedings in directing the complaint to be made were without jurisdiction.

Mr. A. Sanyal, for the applicant.

The Assistant Government Advocate (Dr. M. Wali-ullah), for the Crown.

KENDALL, J.:—This application for revision arises out of the following circumstances. The applicant filed a complaint under section 448 of the Indian Penal Code against Lal Budh Prakash, an Honorary Magistrate, on the 29th of October, 1934. The Magistrate in whose court it was filed did not examine the complainant on oath, but ordered an inquiry by the police, and on November the 5th a report was received that the complaint was false and that proceedings ought to be taken to file a complaint under section 182 of the Indian Penal Code. The Magistrate, therefore, issued notice to the complainant for his appearance to show cause against such a complaint on November the 30th. Without going into details, it may be said that the record shows that this notice was not served on the present applicant. The Magistrate, however, took up the case on November the 30th, and in the absence of the applicant passed an order in which he directed a complaint to be made against the applicant under sections 182 and 211 of the Indian Penal Code.

An appeal was filed by the applicant in the court of the Sessions Judge, and several arguments were advanced against the legality of the Magistrate's order of complaint. The learned Judge dealt with the matter at some length, but he held that there was no legal defect in passing the order without a notice being served on the applicant, and he further held that the proceedings of the Magistrate were not vitiated by his omission to record the

statement of the applicant on oath. The learned Judge remarked: "Here again under the law, as it now stands, no such recording of the statement of the complainant is necessary. In a case like this what has happened is that the Magistrate has refused to take cognizance. It is only when he actually does take cognizance that the Magistrate is bound to take down the statement of the complainant on oath."

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It will be seen that the Magistrate decided to take action against the applicant on the basis of a police report, but it is clear from the wording of the present proviso to sub-section (1) of section 202 of the Criminal Procedure Code that he had no jurisdiction to direct an investigation by the police until he had examined the complainant on oath. His omission to take this necessary step, therefore, vitiated the whole of the proceeding.

I have been referred on behalf of the applicant to a decision of a Bench of the Bombay High Court in the case of *In re Ningappa Rayappa* (1), in which it was held that it was not permissible for the Magistrate to sanction the prosecution of the applicant under sections 182 and 211 of the Indian Penal Code where he had not examined him on oath, and the same view was taken in 1901 by the Judicial Commissioner's Court in Oudh in the case of *Ram Sarup v. King-Emperor* (2). Both these decisions, it will be noted, are prior to the amendment to section 202 of the Criminal Procedure Code by which the proviso referred to above was introduced. I have no doubt, therefore, that the Magistrate's proceedings in directing a complaint to be made were without jurisdiction. I therefore allow the application and set aside the order of the Magistrate in which he directed that a complaint be made against the applicant.

(1) (1924) I.L.R., 48 Bom., 360.

(2) (1901) 4 Oudh Cases, 127.

## FULL BENCH

*Before Sir Shah Muhammad Sulaiman, Chief Justice,  
Mr. Justice Thom and Mr. Justice Iqbal Ahmad*

1935  
April, 4

ABDUL RAHMAN (DEFENDANT) *v.* NIHAL CHAND  
(PLAINTIFF)\*

*Provincial Insolvency Act (V of 1920), sections 28(4) and (5);  
59(d)—Undischarged insolvent's suit to recover loan—Main-  
tainability—Question whether the money lent was property  
which had vested in the receiver—Presumption—Receiver  
should be made party to the suit.*

Under the provisions of section 28, clauses (2) and (4), of the Provincial Insolvency Act, property acquired by or devolving on the insolvent after the adjudication as well as property existing at the time of adjudication stand on the same footing and both vest forthwith in the court or the receiver, as the case may be; although under the English law some distinction has been drawn between the two, in respect of transactions made by the insolvent.

There is no specific provision in the Provincial Insolvency Act under which a suit by an undischarged insolvent is, in express terms, prohibited. Where, however, the property in dispute in a suit brought by an undischarged insolvent is admitted to be vested, or is of such a nature that it must vest, in the receiver, the receiver alone is the proper person to institute suits and proceedings in respect of it, according to section 59(d) of the Act; and the suit brought by the insolvent behind the back of the receiver would be defective.

But where a loan was advanced by the insolvent after his adjudication, and he brings a suit for its recovery, it does not necessarily follow that the money given by the insolvent was property which had vested in the receiver. The insolvent might be a mere benamidar on behalf of an undisclosed principal and the suit would be for the benefit of the real owner; or the loan might have been given out of accumulated savings from such items of property as do not vest in the receiver according to section 28(5) and remain the property of the insolvent himself. It is not appropriate that the defendant who took the money should be allowed to deny that the money belonged to the plaintiff. As a matter of fact there is a presumption in

\*Second Appeal No. 913 of 1932, from a decree of N. L. Singh, Additional Subordinate Judge of Meerut, dated the 22nd of April, 1932, modifying a decree of Usuf-uz-zaman, Second Additional Munsif of Ghaziabad, dated the 8th of January, 1931.

favour of the plaintiff that the money was his own, inasmuch as the receiver had not intervened and seized this amount. Unless, therefore, the defendant definitely established that the money had, in fact, vested in the receiver, the suit can not be thrown out on the mere ground that the plaintiff is an undischarged insolvent. The appropriate course would be to implead the receiver in the suit or at least give him notice of the action so that he may show, if he can, that the property was such as had vested in him, in which case he can take the benefit of the decree and recover the amount thereof.

Mr. *Shiva Prasad Sinha*, for the appellant.

Dr. *K. N. Katju* and *N. C. Vaish*, for the respondent.

SULAIMAN, C.J.:—This is a defendant's appeal arising out of a suit brought by the plaintiff for recovery of Rs.2,000 lent by him to the defendant on the 19th of February, 1927, together with interest at Re.1-4 per cent. per mensem. The defence *inter alia* was that the plaintiff was an undischarged insolvent, and was not entitled to sue. The courts below have overruled the objection and decreed the claim. In second appeal the Division Bench before which the case came up for disposal referred the following question to a Full Bench: "Whether the plaintiff, in view of the fact that he is an undischarged insolvent, is entitled to maintain the present suit."

As in several rulings the rule of law prevailing in England has been frequently invoked, it may be convenient to point out at the outset that in England some distinction has undoubtedly been drawn between property which was owned by the insolvent at the time of his adjudication and property which is acquired by him afterwards. Following certain previous rulings it was laid down in the case of *Cohen v. Mitchell* (1), which was a suit for wrongful conversion of certain machinery, that as regards after-acquired property, a transaction by a bankrupt, if entered into before the trustee had intervened, would not be invalid if the person dealing with him acted *bona fide* and for value. At the same time it was pointed out on page 266 that if a trustee had

(1) (1890) 25 Q.B.D., 262.

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interfered before the money was paid over, he would have been entitled to demand that it should be paid to him. In England this view of the law has been accepted and we now find in section 47 of the Bankruptcy Act of 1914 (4 and 5 Geo. 5. ch. 59) that a special provision is made in respect of property acquired by an undischarged bankrupt subsequently, in which case he is allowed to deal with it before any intervention by the trustee. Section 45 of the Act also gives protection to certain *bona fide* transactions without notice.

But in India neither the Provincial Insolvency Act, 1907, nor the Act of 1920 draws any such distinction. Section 28(2) makes the whole of the property of the insolvent vest in the court or the receiver on the making of the order of adjudication, and sub-section (4) provides that all property which is acquired by or devolves on the insolvent after the date of the order of adjudication and before his discharge shall forthwith vest in the court or the receiver and the provisions of sub-section (2) shall apply in respect thereof.

It is, therefore, perfectly clear that property existing at the time of the adjudication as well as the property acquired by or devolved on the insolvent after adjudication stand on the same footing, and both vest forthwith in the court or the receiver as the case may be. No distinction appears to have been drawn by the legislature in respect of these two classes of property. It would amount to legislating if any such distinction were to be imported into the section on account of certain rules of law which prevail in England. The Insolvency Act in India is not in every respect identical with the Bankruptcy Act in England, and there is accordingly no justification for deciding cases under the Indian Act in the light of cases decided in England.

No doubt in the case of *Ramanadha Iyer v. Nagendra Aiyar* (1) such a distinction was laid down. I am, with great respect, unable to accept such a view.

(1) A.I.R., 1924 Mad., 223.

The cases of *Alimahmad Abdul Hussein v. Vadilal Devchand* (1) and *Chhote Lal v. Kedar Nath* (2) are not in point, because they were not cases arising under the Insolvency Act at all, but were governed by the Insolvent Debtors Act of 1848. They are, therefore, not applicable.

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On the other hand, the Rangoon High Court in the case of *Ma Phaw v. Maung Ba Thaw* (3) held that where the insolvent before the discharge became entitled by inheritance to certain property, the transfer of the property made by him, even before any action was taken by the receiver in regard to such property and even if the transferee took the property for value, *bona fide* and without notice, was void as against the receiver.

The view taken by the Full Bench in the case of *Gobind Ram v. Kunj Behari Lal* (4) undoubtedly was that an insolvent has no transferable interest left in his property after the vesting order. The position has now been made clear by their Lordships of the Privy Council in the case of *Kala Chand Banerjee v. Jagannath Marwari* (5). After quoting section 16 of the Insolvency Act of 1907, their Lordships on page 597 observed: "This provision is perfectly clear. The moment the inheritance devolved on the insolvent Amulya, who was still undischarged, it vested in the receiver already appointed, and he alone was entitled to deal with the equity of redemption." Again on page 599 it was said: "that does not in the least imply that an action against him (insolvent) may proceed in the absence of the person to whom the equity of redemption has been assigned by the operation of law. The latter alone is entitled to transact in regard to it and he, and not the insolvent, has the sole interest in the subject-matter of the suit." Their Lordships pointed out that the contrary view would encourage collusive arrangements

(1) (1919) I.L.R., 43 Bom., 890.

(2) (1924) I.L.R., 46 All., 565.

(3) (1926) I.L.R., 4 Rang., 125.

(4) (1923) I.L.R., 46 All., 398.

(5) (1927) I.L.R., 54 Cal., 595.



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and might involve the sacrifice of properties which ought to be made available for the benefit of creditors.

I am, therefore, of opinion that whether the property in question be property which existed at the time of the adjudication or was acquired by or devolved on the insolvent afterwards, it vests in the receiver, and he alone is entitled to deal with it.

The case of *Rup Narain Singh v. Har Gopal Tewari* (1) is distinguishable, because in that case the mortgagor was subsequently discharged and he could be held to be estopped from denying the validity of his own mortgage.

The question whether an insolvent can maintain a suit for recovery of a loan advanced by him stands on a slightly different footing.

It has been held in the case of *Khelafat Hussain v. Azmat Hussain* (2) that an insolvent cannot maintain a suit in his own name for the deferred dower of his daughter, even though the receiver has refused to bring such a suit. In the case of *Rozario v. Mahomed Ebrahim Sarang* (3) it was held that where an insolvent without the knowledge of the official assignee and without bringing the fact of his adjudication to the notice of the court obtained a decree in respect of a debt due to him prior to his insolvency, the decree could be set aside on the ground of fraud, even by the judgment-debtor. In the case of *Sayad Daud v. Mulna Mahomed* (4) it was held that as the whole of the insolvent's property vests in the official assignee, nothing is left vesting in the insolvent which can give him a cause of action, and that a suit by him in his own name after his adjudication cannot be maintained. It was even held that the addition of the official assignee later would amount to adding a new plaintiff. In the case of *Bhagwan Das v. Amritsar National Bank* (5) the right of appeal to a judgment-debtor was denied after he had

(1) (1933) I.L.R., 55 All., 503.

(2) (1919) 54 Indian Cases, 699.

(3) (1924) I.L.R., 48 Rom., 583.

(4) A.I.R., 1926 Rom., 366.

(5) (1928) 111 Indian Cases, 432.

been declared an insolvent and it was held that the receiver alone should appeal.

There is, however, one aspect of the matter which does not appear to have been pressed by counsel in these cases. Section 28, sub-section (2) prohibits suits being brought by creditors against the property of the insolvent and also prohibits the commencement of any suit or other legal proceeding by a creditor. But there is no specific provision in the Act under which a suit by an insolvent after his adjudication is, in express terms, prohibited. Section 59(d), however, empowers a receiver, by leave of the court, to institute, defend or continue any suit or other legal proceeding relating to the property of the insolvent. This provision implies that the receiver is the proper person to institute, defend or continue suits and proceedings relating to the insolvent's property.

Where the property in dispute in a suit is admitted to be vested, or is of such a nature that it must vest, in the receiver, a receiver alone is the proper person to institute suits and proceedings. The suit brought by an insolvent behind the back of the receiver would be defective.

But where a loan was advanced by the insolvent after his adjudication to the defendant, it does not necessarily follow that the sum of money given by the insolvent was property which had vested in the receiver. The insolvent might be a mere benamidar on behalf of an undisclosed principal, in which case he would be entitled to sue even though an insolvent and the suit would, of course, be for the benefit of the real owner. Again, under section 28(5), properties exempted by the Code of Civil Procedure or other enactments from liability to attachment and sale in execution of a decree do not vest in the receiver. Such moneys as are exempted remain the property of the insolvent and if he has lent the money out of such accumulated savings, there would be no bar either to his lending the money

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to the defendant or to his bringing a suit to recover the amount.

At the same time, as a receiver is an officer of the court acting under the control and directions of the court and in the interest of the insolvent's creditors, it is the duty of the court to see that no fraud is perpetrated before its eyes and that the insolvent does not walk away with moneys which ought to go to the officer of the court. An appropriate course would, therefore, seem to be to implead the official receiver in the suit or at least give him notice of the action so that when a decree is passed in favour of the plaintiff, the receiver may be at liberty to take the benefit of the decree and recover the amount due under it, if it can be shown that the property was such as had vested in the receiver. Such inquiry can easily be made either in the execution department or by a separate suit between the receiver and the insolvent.

But it seems to me inappropriate that the present defendant who took the money from the plaintiff should be allowed to deny that the money belonged to the plaintiff. *Prima facie* there is no presumption that the money did not belong to the plaintiff. As a matter of fact as the receiver had not intervened and seized this amount, there is a presumption in favour of the plaintiff that the money was his own. The suit, therefore, cannot be thrown out on the mere ground that the plaintiff is an insolvent. Had the defendant established definitely that the money had, in fact, vested in the receiver and was not the property of the plaintiff, the matter might possibly have been different. Notice should accordingly be given of this appeal to the receiver and then the decree of the courts below upheld.

THOM, J.:—I concur.

IQBAL AHMAD, J.:—I agree.

## APPELLATE CIVIL

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and  
Mr. Justice Bennet*

AJODHYA PANDE (DEFENDANT) *v.* RAJNA AND OTHERS  
(PLAINTIFFS)\*

1935  
April, 5

*Agra Tenancy Act (Local Act II of 1901), section 22—N.-W. P. Rent Act (XII of 1881), section 9—Occupancy tenant—Succession—Hindu widow succeeding to occupancy tenant before the Act of 1901—Succession to such widow on her death after the coming into force of that Act.*

Section 22 of the Agra Tenancy Act, 1901, was not intended to apply at all to the case of a Hindu widow who had, prior to the coming into effect of that Act, and in accordance with section 9 of the N.-W. P. Rent Act XII of 1881, succeeded to the estate of a Hindu widow in the occupancy tenancy of her husband; and upon the death of such widow, her heir was to be ascertained with reference to the Hindu law and not to the Tenancy Act of 1901. So, where an occupancy tenant died while the Act of 1881 was in force and his widow succeeded him, and the widow died while the Act of 1901 was in force, it was *held* that the daughter was entitled to succeed.

Mr. *Haribans Sahai*, for the appellant.

Dr. N. P. *Asthana*, for the respondents.

BENNET, J.:—This is a Letters Patent appeal by a defendant under the following circumstances. The opposite party, Mst. Rajna, was one of the plaintiffs in a suit asking for possession of an occupancy holding on the grounds that she was the daughter of Madho, who died some time previous to Act II of 1901, that Madho had been succeeded by two widows both of whom died during the pendency of Act II of 1901, the last widow dying in the year 1924, and that the defendants had interfered with her possession. The defendant appellant before us based his claim on two grounds, firstly that he was related to Madho and entitled to succeed Madho as a reversioner and secondly that he was one of the zamindars and he claimed that Mst. Rajna was not entitled to succeed to this occupancy tenancy on the

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\*Appeal No. 86 of 1934, under section 19 of the Letters Patent.

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death of the last widow in the year 1924. The case raises difficult points of interpretation of section 22 of Act II of 1901. The learned single Judge has held against the appellant. Various rulings have been cited and it must be admitted that the rulings are very conflicting. The question is, where an occupancy tenant dies during the pendency of Act XII of 1881 and his widow succeeds and that widow dies during the pendency of Act II of 1901, who is entitled to succeed to the occupancy holding? On the one hand, various rulings have held that section 22 of Act II of 1901 applies and that the widow is to be taken as the occupancy tenant for the purpose of that section and that the order of succession prescribed by that section should be followed in relation to her. On the other hand, a number of rulings have laid down that in this case section 22 is not intended to apply and that the succession must be governed by the ordinary rules of the personal law which applies to succession to land as laid down in section 9 of Act XII of 1881, subject to the condition imposed by that section that no collateral relation shall succeed unless he shared in the cultivation. We confess that there is considerable difficulty in interpreting section 22 of Act II of 1901 and it is not at all clear whether it was or was not intended to apply to a case of this nature. To make the section apply to a case of this nature the aid of section 13 of the U. P. General Clauses Act will have to be invoked. Section 13 of that Act lays down that unless there is anything repugnant in the subject or in the context, words importing the masculine gender should be taken to include females. But we consider that there are things repugnant both in the subject and in the context. As regards the subject, the question is in regard to widows who in the case of Hindu widows are holding the estate of a Hindu widow in the tenancy in question. Such an estate is limited in the manner of Hindu law and the Hindu law provides a certain order

of succession by the reversioners on the death of the widow. If section 22 was intended to apply to those Hindu widows who were holding the interest of a Hindu widow when the Act came into force, then we would have expected to find a definite provision in section 22 to that effect, but the section is entirely silent as to what is to happen in the case of such widows, and the section does not purport at all to deal with widows. Then again when we come to the question of context, we find that in this section 22 there is a provision in sub-section (b) for the interest to devolve "on his widow till her death or re-marriage". As a female cannot have a widow this provision is therefore repugnant to making section 22 apply to female holders. From these considerations of the subject and the context we come to the conclusion that the table of succession in section 22 was not intended to apply to widows who had succeeded under section 9 of Act XII of 1881 to the interest of a Hindu widow in the tenancy of an occupancy tenant. Act II of 1901 provided in section 16 that "Every tenant having a right of occupancy under section 11, or under the corresponding provisions . . . of Act XII of 1881 . . . shall be called an occupancy tenant, and shall have all the rights and be subject to all the liabilities conferred and imposed on occupancy tenants by this Act." One of the rights under the Act is set forth in section 20(2): "The interest of . . . an occupancy tenant . . . is, subject to the provisions of this Act, heritable." The interest therefore remained heritable; but the Act did not contain any provision which applied to the order of inheritance in the case in question. Even under the general law apart from Tenancy Acts the interest of a tenant is heritable. In the Transfer of Property Act, Act IV of 1882, chapter V provides that the interest of a lessee is transferable, and therefore heritable; but section 117 bars chapter V applying to agricultural leases except when notified by

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the Local Government. In the Contract Act section 37 provides that "promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract." The fact that the occupancy tenancy remained heritable but that the order of succession was not affected is also shown by section 2(4), Act II of 1901, which provided: "All . . . rights acquired . . . under the enactments hereby repealed shall, so far as may be, . . . be deemed to have been acquired . . . hereunder." The words "so far as may be" show that the provisions of Act II of 1901 only apply so far as may be suitable.

We now examine the cases which have been cited in this appeal. In order of time comes *Dulari v. Mul Chand* (1), where the occupancy tenant died under Act XII of 1881 leaving two daughters, Mst. Shibbo poor and Mst. Dulari rich. Under Hindu law Mst. Shibbo alone succeeded, and on her death Mst. Dulari claimed against the sons of Mst. Shibbo. The court held: "Section 22 of the Tenancy Act purports to provide for the devolution of an occupancy holding, and if the estate of Mst. Shibbo was that of a full occupancy tenant within the meaning of the section, then there is no doubt that the holding would devolve upon her death on her sons. Mst. Dulari, the plaintiff, however contends that Mst. Shibbo had only a daughter's estate, that is, a restricted life estate in the holding which came to an end with her death." With this part of the judgment we are in agreement and we consider that this passage was a sufficient reason for the finding that Mst. Dulari had a right to succeed, as the succession in section 22 did not apply to Mst. Shibbo as she was not a full occupancy tenant. The judgment went on to say: "It seems to us that Mst. Dulari's rights were acquired on the death of her father, that is to say, prior to the passing of the present Tenancy Act, and that

(1) (1910) I.L.R., 32 All., 314.

these rights were merely postponed during the lifetime of Mst. Shibbo. The present Tenancy Act does not purport in any way to take away the rights which had already been acquired." We think that Mst. Dulari did not acquire rights on the death of her father, but she had a mere *spes successionis* or chance of succeeding, such as is mentioned in the Transfer of Property Act, section 6(a), as not transferable. The next case, *Musammat Sumari v. Jageshar* (1) by a single Judge, was one where the facts were identical with the case before us. An occupancy tenant was succeeded by his widow under Act XII of 1881 and his widow died under Act II of 1901, leaving a daughter who sued for possession as heir of the occupancy tenant. The defence was that under Act II of 1901 the daughter had no right to succeed. The learned Judge did not consider whether the provisions of Act II of 1901 applied to the case. He merely distinguished the ruling in *Dulari v. Mul Chand* (2) on the ground that it had been held there that Mst. Dulari had acquired the right to succeed on the death of her father and that right had merely been postponed during the lifetime of her poor sister. As the daughter in the case before him had not acquired any such right of succession on the death of her father but had a mere *spes successionis* which might have been defeated by the birth of a posthumous son or by adoption, the learned single Judge held that the plaintiff had no right to succeed. The judgment does not deal with the problem of what is the rule of succession in such a case.

In *Nathu v. Gokalia* (3) an occupancy tenant died under Act XII of 1881 and was succeeded by his widow who died under Act II of 1901, and her daughter took possession. The plaintiffs were brothers and nephews of the father, who in the case of two of them alleged that they had been joint in cultivation with him. The Bench held in the alternative that the plaintiffs could

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(1) (1913) 20 Indian Cases, 7.

(2) (1910) I.L.R., 32 All., 314.

(3) (1915) I.L.R., 37 All., 658.



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not succeed: "Section 22 of the Agra Tenancy Act provides for the devolution of the interest of an occupancy tenant, but it is perfectly clear from the language of the section that it only provides for such devolution where the tenant dies after the passing of the Act. If we regard Parbhu's widow as the full tenant of the occupancy holding, the plaintiffs have no right, because they are not the male lineal descendants of Parbhu's widow, nor did they share in the cultivation with her. If we consider that Parbhu was the last full tenant, and that his widow only succeeded to a widow's estate, then it seems to us that section 22 of the Tenancy Act has not provided for the devolution in such a case."

*Bisheshar Ahir v. Dukharan Ahir* (1) was also a case where the occupancy tenant died under Act XII of 1881 and he was succeeded by two daughters Mst. Dilasi and Mst. Sumitra. Mst. Dilasi died first and then Mst. Sumitra died. Plaintiffs were the son and grandson of Mst. Dilasi and defendant was the son of Mst. Sumitra. The two lower courts held that the plaintiff who was the son of Mst. Dilasi had a right to half the holding, and the defendant had a right to the other half. Mst. Sumitra died while Act II of 1901 was in force. On page 200 it was held by the Bench: "Section 22 of the Agra Tenancy Act provides that when an occupancy tenant dies his interest shall devolve as therein provided. If we regard Mst. Sumitra as the occupancy tenant within the meaning of section 22 of the Tenancy Act the plaintiff's title fails. It seems to us that we cannot regard Mst. Sumitra as the full occupancy tenant. When she and her sister succeeded they succeeded merely as Hindu ladies. There is nothing in the Agra Tenancy Act which enlarges the estate of a Hindu female in an occupancy holding in possession at the time the Act was passed beyond the ordinary estate of a Hindu female. If the Act has not provided for the devolution of the

(1) (1916) I.L.R., 38 All., 197.

interest in an occupancy holding where it was, at the passing of the Act, in the possession of a Hindu female as such, we think that we ought to go to the ordinary Hindu law to ascertain the rights of the parties . . . We think that the decisions of the courts below were correct and ought to be restored." We consider that the law laid down in this ruling should be applied to the present case, and we agree that we should go to the ordinary Hindu law to ascertain the heir and that Act II of 1901 does not provide for the present case.

In *Bhup Singh v. Jai Ram* (1) the law is not clearly laid down. In *Bechu Singh v. Baldeo Singh* (2) an occupancy tenant died under Act XII of 1881 and his widow died under Act II of 1901, and reversioners of the husband sued to eject one Baldeo Singh as her representative. On page 331 the Bench held: "As we have stated above, the succession opened out to the estate of Ram Kirpal when the Rent Act of 1881 was in force. The actual possession of the plaintiffs, if they were then in existence, was merely postponed during the lifetime of the widow; see *Dulari v. Mul Chand* (3)." We do not think that this reasoning is correct, although we agree that the Bench was correct in dismissing the plaintiffs' appeal on the ground that they had not shared in the cultivation of Ram Kirpal.

In *Bhawani Bhikh v. Sidh Narain* (4) a learned single Judge put forward a different view from other rulings and held that where a male tenant died under Act X of 1859 and his widow died under Act II of 1901 "succession would open out on her death to the heirs of the last male holder and would go to the persons entitled under section 22 of the Agra Tenancy Act II of 1901 and then in existence, provided that if those persons are the daughter's sons or collateral male relatives in the male line of descent, they must be co-sharers in the cultivation of the holding at the time when

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(1) (1918) 16 A.L.J., 459.

(3) (1910) I.L.R., 32 All., 314.

(2) (1922) I.L.R., 44 All., 327.

(4) A.I.R., 1923 All., 18.

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the *last* occupant died." By last occupant the court meant the widow.

We consider that the weight of judicial decision is in favour of the view which we have taken, that where an occupancy tenant dies under Act XII of 1881 and is succeeded by his widow who dies under Act II of 1901, the succession is not governed by section 22 of Act II of 1901 but by the personal law of the deceased male occupancy tenant. The plaintiff Mst. Rajna as a daughter of the male occupancy tenant is entitled to hold on the death of the last surviving widow. The learned single Judge has decided in her favour. We dismiss this Letters Patent appeal with costs.

SULAIMAN, C.J.:—Without committing myself to the view that a widow who succeeded to her husband after 1901 is not an occupancy tenant within the meaning of the Tenancy Act II of 1901, I agree that the preponderance of authority is in favour of the view that the succession after her death, occurring before 1926, is not governed by section 22 of Act II of 1901, but by the personal law of her deceased husband. The least objectionable interpretation of section 22 is that it did not apply to such widows at all. I, therefore, concur in the order proposed.

### FULL BENCH

*Before Mr. Justice Niamat-ullah, Mr. Justice Bennet and  
Mr. Justice Rachhpal Singh*

1935  
April, 17

BISHAN SARUP (PLAINTIFF) v. MUSA MAI, AND OTHERS  
(DEFENDANTS)\*

*Court Fees Act (VII of 1870), section 7(iv)(c); schedule II, article 17(iii)—Specific Relief Act (I of 1877), sections 39, 40, 42—Declaration—Consequential, relief—Cancellation of instrument—Suit for declaration that plaintiff's title has not been affected by a sale deed executed by another person, it being void and ineffectual as against plaintiff—Cancellation*

\*Stamp Reference in Second Appeal No. 51 of 1933.

*not specifically asked for in plaint, and specifically disclaimed in statement made by plaintiff—Whether court can treat suit as one for cancellation—Construction of plaint for purposes of court fee—Court Fees Act, section 6.*

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The plaintiff brought a suit on the allegations that he and his brother formed a joint Hindu family, that the brother had, without any right, executed two sale deeds of parts of the family property in favour of the defendants, that the sale deeds were void and ineffectual, and that the plaintiff continued in possession. The relief claimed was a declaration (*istiqrar*) that by virtue of the sale deeds, which were void and ineffectual as against the plaintiff and the joint family property, the defendants had not acquired any right to any part of the property. A court fee of Rs.10 was paid, as for a declaratory relief, in respect of each of the two sale deeds. No question was raised in the lower courts as to the amount of court fee, but when the case came up in second appeal to the High Court objection was raised that the suit amounted to a suit for the cancellation of the sale deeds and that court fee was to be paid accordingly. The plaintiff maintained that there was no claim for cancellation, and that he claimed nothing more than a declaration that his rights in the property were not affected by the sales which he characterised as void and ineffectual as against his interests in the property.

*Held by the Full Bench (BENNET, J., dissenting).—*

1. Where a plaint is so worded as to disclose a suit falling either under section 39 or section 42 of the Specific Relief Act, it is not open to a court to treat the suit as one falling within the purview of section 39 of the Specific Relief Act if the plaintiff desires it to be construed as one under section 42 of that Act.

2. The court fee in this case was sufficient.

The word "*istiqrar*" may signify either "declaring" or "adjudging"; so that, where a plaintiff claims an "*istiqrar*" that his rights in certain property are not affected by a particular document because it is void as against him, he may be understood to be asking only a *declaration* that the transaction evidenced by the document is void and ineffectual as against his interests, or he may be understood to be asking for the document to be *adjudged void* against him and, therefore, claiming the relief of cancellation. Unless the plaintiff has expressly claimed the relief of cancellation, or unless on a proper construction of the plaint as a whole the court arrives at the conclusion that the suit is essentially and in substance one asking

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for cancellation and the plaintiff makes no amendment or disclaimer, it is not open to the court to treat the suit as one under section 39 of the Specific Relief Act though in form it is one which may come under section 42 of that Act and the plaintiff maintains and makes it clear by subsequent statement or amendment, if necessary, that the suit should be treated as one under section 42. After a plaintiff has declared unequivocally, by amendment or otherwise, that he desires no more than a declaratory relief of the nature described in section 42, the court must proceed on that footing for all purposes of court fee, leaving the plaintiff to take the possible consequences of his own action in deliberately instituting a declaratory suit where a suit for cancellation would have been more appropriate. Consideration of the frame of the suit for the purposes of court fee and that for the purposes of decision of the suit must be kept quite apart.

A suit for a declaration of right does not cease to be such and necessarily become one for cancellation of an instrument, if an instrument is specifically referred to as having no adverse effect on the plaintiff's rights. It is permissible for a plaintiff to obtain a declaration under section 42 of the Specific Relief Act that a certain instrument is void as against him and does not affect his rights. The scope of section 39 of the Act is distinct from that of section 42. The relief under section 39 has the effect of absolutely annulling the instrument and its contents wholly or in part; whereas the object of the relief under section 42 is to obtain a recognition of the plaintiff's right, and the void or voidable character of the instrument comes under consideration incidentally for determining the plaintiff's right, and the relief has not the effect of absolutely annulling the instrument wholly or in part. There is a wide difference between setting aside a sale and holding that the plaintiff's rights are not affected by it.

[*Per* BENNET, J.:—Section 39 of the Specific Relief Act deals with written instruments, and section 42 does not; the cause of action for section 39 is the execution of the written instrument. If the plaint does ask the court to adjudge that a written instrument is void or voidable, then the plaint is clearly one under section 39, and the addition of any other relief for a declaration under section 42 would not alter its character as a plaint under section 39; and no question of any ambiguity could arise. It does not matter whether the plaint specifically asks for cancellation or not. Further, if an instrument is adjudged void so far as the plaintiff is concerned, even

though there is no order that it be delivered up and cancelled, still the effect is that so far as the plaintiff is concerned the instrument is cancelled and no longer exists. The suit coming under section 39, an *ad valorem* court fee must be paid.

Assuming, however, that a plaint could be read as falling either under section 39 or section 42, then the court fee would be under schedule I or schedule II, respectively, of the Court Fees Act; and according to section 6 of the Court Fees Act the court fee on such a plaint must not be less than either the *ad valorem* fee under schedule I or the fixed fee under schedule II. Section 6 clearly indicates that where a document comes under either schedule, the court fee must not be less than what each schedule prescribes, i.e. the court fee must satisfy both schedules.]

Messrs. B. Malik and Jagdish Swarup, for the appellant.

Mr. Muhammad Ismail (Government Advocate), for the Crown.

NIAMAT-ULLAH, J.:—The plaintiff paid a court fee of Rs.20 on two declaratory reliefs. The stamp reporter construed the reliefs as those for cancellation of instruments, on which *ad valorem* court fee on the value of the subject-matter was payable in the lower court. The case was laid for decision before a Division Bench, which referred two questions for decision by a Full Bench.

The reliefs in question were claimed by the plaintiff on the allegations that he and his brother Komal Jha formed a joint Hindu family owning, *inter alia*, two houses, that Komal Jha sold one of them by a deed, dated the 24th October, 1931, to the first defendant, and sold the other by a deed dated the 21st October, 1931, to the second defendant, that Komal Jha had no right to execute the aforesaid sale deeds, which are "null and void and ineffectual", that the plaintiff is in possession of the houses in dispute and is entitled to have it declared that the purchasers (defendants Nos. 1 and 2) did not acquire any right to the houses in dispute by virtue of their respective purchases, which are void against the plaintiff and the joint family. After these

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allegations, the plaintiff proceeded to claim the following reliefs: "It may be declared that by virtue of the purchase made under the sale deed dated the 24th of October, 1931, in favour of defendant No. 1, and under the sale deed dated the 21st of October, 1931, in favour of defendant No. 2, which are null and void and ineffectual as against the plaintiff and the joint family property, defendants Nos. 1 and 2 did not acquire any right to any part of the houses mentioned at the foot hereof."

The plaintiff treated these reliefs as of declaration, and paid a court fee of Rs.20, i.e., Rs.10 in respect of each relief. No question was raised in the lower courts. Eventually the plaintiff's suit was dismissed on the merits. He appealed to this Court, where the question arose for the first time on the report of the stamp reporter as to whether the reliefs are those for cancellation of the two sale deeds referred to in the plaint.

A reference to section 42 of the Specific Relief Act with its illustrations (to which I shall advert later) will show that a plaintiff is entitled to sue for a declaration that a certain transfer, being void or voidable at his option, does not affect his right in the property to which it relates. Section 39 of that Act, on the other hand, provides that any person against whom a certain instrument is void or voidable may sue to have it adjudged void or voidable, and the court may in its discretion so adjudge it and order it to be delivered up and cancelled. Section 40 of the same Act provides for partial cancellation of an instrument "where it is evidence of different rights or different obligations". Seemingly the two sections overlap each other, and the same relief may be considered to be one for declaration or for cancellation. "Declaring" or "adjudging" are expressed by the same word in Urdu, namely, "istiqrar", so that, where a plaintiff claims an "istiqrar" that a document is void against him and against his interests, he can be understood to be claiming a declaration that the transfer

evidenced by a certain deed is void and ineffectual against him and against his interests. He may also be understood as suing for the instrument being adjudged void against him, and therefore claiming the relief of cancellation. As held in *Kalu Ram v. Babu Lal* (1), it is not necessary for the plaintiff to ask for the document being delivered up and cancelled, which is for the court to direct. In these circumstances, questions frequently crop up in this Court on office reports in cases in which declaratory suits were entertained in the lower courts and disposed of as such. The stamp reporter maintains in all such cases that the relief claimed by the plaintiff is one for cancellation, and he points to the relief claimed by the plaintiff as one amounting to a demand for the instrument being adjudged void. The plaintiff, on the other hand, protests against his suit being treated as one for cancellation, and lays stress on the fact that he claims no more than a declaration that the transfer evidenced by a certain instrument, which is characterised as void or voidable, does not affect his interests. The present case is an instance in point. *Ex facie*, the relief as worded in the original plaint may be so rendered in English as to make it arguable that it is a relief of cancellation. As against this it can be urged, with at least equally good reasons, that the plaintiff is claiming no more than a declaration of his right to the property conveyed by the sale deeds, which are characterised as void and not affecting his rights. In this state of the matter, the Divisional Bench, before which the case was originally laid, referred the following two questions for decision by a Full Bench:

(1) Where a plaint is so worded as to disclose a suit falling either under section 39 or section 42 of the Specific Relief Act, is it open to a court to treat the suit as one falling within the purview of section 39 of the Specific Relief Act, if the plaintiff desires it to be

(1) (1932) I.L.R., 54 All., 812.

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construed as one under section 42 of the Specific Relief Act?

(2) Whether the court fees payable on the plaint and the memorandum of appeal in the lower appellate court in this case should be *ad valorem* on the value of the subject-matter, or Rs.10 only under article 17(iii), schedule II of the Court Fees Act.

The answer to the first question will largely depend upon the scope of section 42 of the Specific Relief Act. Does that section permit a suit for a declaration that the plaintiff has a right to a certain property which is not affected by the transfer evidenced by a certain instrument? If it does and the plaint in a given case, read as a whole, can be construed as a claim for a declaration of that kind, there can be no reason why the plaintiff's desire to have it treated as a suit for declaration and not as one for cancellation should not be given effect to.

The Court Fees Act, which was passed in 1870, does not make any specific provision in respect of a suit for cancellation. Section 7(iv)(c) provides for a suit "to obtain a declaratory decree or order where consequential relief is prayed". Schedule II, article 17 provides a fixed fee of Rs.10 for a suit "to obtain a declaratory decree where no consequential relief is prayed." The Specific Relief Act was passed seven years after the Court Fees Act, and statutory provision was made for the first time in respect of suits for cancellation (sections 39 and 40) as distinct from suits for declaration (section 42). Before the passing of the Specific Relief Act, a suit for cancellation was treated by this and other High Courts as one for a declaratory relief where consequential relief was prayed, so that court fee was payable on the value put by the plaintiff on the relief sought by him. See the cases noted in *Karam Khan v. Daryai Singh* (1), in which it was held for the first time by a Full Bench of five Judges that the relief of cancellation of an instrument, contemplated by section 39 of the Specific Relief

(1) (1833) I.L.R., 5 All., 331.

Act, was in the nature of a relief for a declaratory decree in which no consequential relief was claimed. This view does not appear to have been questioned till comparatively recently, when another Full Bench of five Judges considered the question in *Kalu Ram v. Babu Lal* (1), in which the plaintiff sued for cancellation of a decree passed on the basis of a compromise in a suit brought on a mortgage deed executed by a member of a joint Hindu family of which the plaintiff was a member. The question was whether the suit should be considered to be one for a simple declaratory relief or for a declaratory relief with a consequential relief. It was held that "Where a suit is for the cancellation of an instrument under the provisions of section 39 of the Specific Relief Act, the relief is not a declaratory one. It falls neither under section 7(iv)(c), nor under schedule II, article 17(iii), but under the residuary article, namely schedule I, article 1 of the Court Fees Act" which provides for *ad valorem* court fee on the value of the subject-matter. The court proceeded to hold that "The court fee in respect of the prayer for cancellation of the decree is payable under schedule I, article 1, on the value of the decree. As the compromise has merged in the preliminary decree and the latter has merged in the final decree, we consider that the cancellation of the compromise, the preliminary decree and the final decree are not 'distinct subjects' within the meaning of section 17, but in reality only one subject." It should be noted that in that case there was no ambiguity and there was no question whether the suit was for cancellation or for declaration. The plaintiff intended to claim, and expressly claimed, for cancellation of a decree but maintained, on the authority of *Karam Khan v. Daryai Singh* (2), that for purposes of court fees all suits for cancellation are suits for declaration in which no conse-

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(1) (1932) I.L.R., 54 All., 812.

(2) (1883) I.L.R., 5 All., 331.

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quential relief is claimed. It should also be observed that a decree was treated as an instrument, within the meaning of section 39. The question was not prominently raised, and it is difficult to say what the decision of the court would have been if it had been argued that a decree could not be an instrument within the meaning of that section. This question was subsequently raised in another Full Bench case, *Sri Krishna Chandra v. Mahabir Prasad* (1), in which it was held that where the plaintiff merely asks for a declaration that the previous decree is not, in any way, binding on him and is altogether void and ineffectual, the suit was one for a declaratory relief only and fell under article 17(iii) of the second schedule of the Court Fees Act, and the court fee of Rs.10 was sufficient. It was observed that "The case of a decree stands on a different footing, because a suit to avoid it does not strictly fall under section 39 of the Specific Relief Act. Strictly speaking, it would not even fall within the scope of section 42 of the Specific Relief Act. Where the plaintiff chooses to ask for a definite relief for the cancellation of a decree or for the setting aside of that decree, in addition to a declaration that the decree is not binding upon him, he is professedly asking for something more than a mere declaratory decree. At the stage at which the question of court fee arises, it is immaterial to consider whether such a relief is superfluous, redundant or useless, or even impossible to be granted. Obviously he has asked for more; and so long as he does not amend his plaint and abandon this relief he can be called upon to pay court fee for the relief asked for." In the case noted last the relief of cancellation of decree had not been asked for, and the learned Judges, therefore, treated it as a suit for a declaration that the decree was void and not binding on the plaintiff, on which a court fee of Rs.10 was considered to be sufficient under article 17(iii), schedule II of the Court Fees Act.

(1) (1933) I.L.R., 55 All., 791(795).

In this state of authorities I am bound to follow the later Full Bench rulings in preference to *Karam Khan v. Daryai Singh* (1), and to hold that where a plaintiff expressly claims the relief of cancellation such as is contemplated by section 39 of the Specific Relief Act, the suit is not one for a declaratory relief with or without consequential relief, and that the relief of cancellation is itself a substantial relief, on which *ad valorem* court fee under article 1, schedule I, is payable. I, however, find nothing in these cases which justifies the view that though the plaintiff does not expressly claim the relief of cancellation but a mere "istiqrar" (declaration or adjudication) that an alienation evidenced by an instrument is void against him and does not affect his interests, the relief claimed by him must be construed as one for cancellation, despite his emphatic disclaimer.

It was argued by the learned Government Advocate that if the plaintiff makes a specific reference to an instrument in the relief paragraph of his plaint, characterising it as void or voidable, and asks for a declaration that it is not binding upon him, he must be taken to be claiming the relief of cancellation under section 39 of the Specific Relief Act, inasmuch as he virtually asks for the document being adjudged void, which is the only claim which he need make in a suit for cancellation. It is pointed out that it is the court which is given the discretion to order that the instrument be "delivered up and cancelled", whether the plaintiff asks for it or not. Reliance is placed on the case of *Kalu Ram v. Babu Lal* (2), wherein it was observed, in reference to the terms of section 39 and the illustrations appended to it, that "the relief is available even to persons other than parties to an instrument, and in respect of both void and voidable instruments. It is equally clear that a plaintiff need only ask for the instrument to be adjudged void or voidable and need

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(1) (1883) I.L.R., 5 All., 331.

(2) (1932) I.L.R., 54 All., 812(820).

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not in express terms ask for it to be delivered up and cancelled. Even though no relief for cancellation is asked for, a court may grant cancellation also. But this does not prevent a plaintiff from also asking in express terms a relief for its being delivered up and cancelled, if he feels that having it merely adjudged void or voidable would not be adequate for his purpose." I fully accept the correctness of this view. The learned Judges did not lay down that, even where a plaintiff expressly states that he does not claim cancellation but only a declaratory relief contemplated by section 42, the court should nevertheless treat the suit as one for cancellation and compel the plaintiff to pay enhanced court fee. The learned Judges further observed, at page 821, that "A relief to have a registered instrument adjudged void or voidable, with the possible result of its being delivered up and cancelled and a copy of the decree being sent to the registration office for a note to be made by the registering officer in his books, is much more than a mere declaratory relief. It is undoubtedly a substantial relief of a nature differing from a declaratory one." It is argued that where a plaintiff asks for a declaration that an instrument is void and does not affect his interests, the court may adjudge the instrument to be void and order it to be delivered up and cancelled and that in so far as there is a possibility of such a result, the suit should be treated as one for cancellation, as laid down in the dictum last quoted. I am unable to accept this contention, because if the plaintiff makes it clear in the plaint or subsequently by an amendment or by a statement in the nature of pleadings that his suit is not one under section 39 but under section 42, there is no possibility of the court ordering the instrument to be delivered up and cancelled under section 39, which is not, *ex hypothesi*, relied on. I may note that in the case before the Full Bench the plaintiff had expressly claimed the relief of cancellation of a decree, and any observations therein made in reference

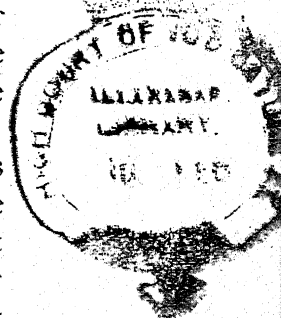
to cases in which the relief of cancellation is not expressly claimed are in the nature of *obiter dicta* and not binding; but I am prepared to accept even such *dicta*, as in my opinion it was far from the intention of the learned Judges to hold that it was open to the court to treat a suit as one under section 39, though in form it could be one under section 42 and though the plaintiff maintains and desires that his suit should be treated as one for declaration under section 42 of the Specific Relief Act.

The learned Government Advocate seemed to suggest that section 42 merely contemplates cases in which a declaration of a right to property or to any legal character is claimed without reference being made to any instrument, and that if a document is specifically referred to in relation to the plaintiff's right which he seeks to be declared, the suit ceases to be one for a declaration and becomes one for cancellation of the instrument. This view of section 42 is refuted by the illustrations appended to it and is otherwise incorrect. A person's right may depend upon the validity or invalidity of a deed affecting it, and it may be impossible to declare his right without adjudicating upon the validity of such deed. Illustration (c) to section 42 permits a suit for declaration that a certain covenant is void for uncertainty. The covenant, assuming it to be in writing, must be referred to in order to declare that it is void. Similarly, illustration (d) permits a suit for a declaration that an alienation made by the holder of a life-interest is void against a reversioner. The deed, by which the alienation was made, must of necessity be referred to in granting the declaration. In this connection section 40 of the Specific Relief Act, which provides for partial cancellation, has a material bearing. If the argument, above referred to, is correct, the declaration amounts to a partial cancellation of the instrument by which the property is alienated. The declaration which the court can grant in such a case is that the

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deed is void, except as regards the life-interest of the alienor. If the argument noted above is correct, the relief amounts to a partial cancellation of the deed, and to that extent the suit is not one for declaration. The same is the case with illustration (e). Illustration (f) permits a suit for a declaration that an adoption is invalid. If the adoption is evidenced by a registered instrument, such a suit—if the argument in question is correct—will be one for cancellation and cease to be a suit for declaration. I am clearly of opinion that it is permissible for a plaintiff to obtain a declaration under section 42 that a certain instrument is void against him and does not affect his rights.

It seems to me clear that the scope of section 39 is distinct from that of a suit under section 42 of that Act. If the plaintiff desires the cancellation of an instrument he asks for its complete annulment; and if the court grants such relief, the instrument ceases to be a subsisting deed. It is delivered up and cancelled. A note is to be made in the registration office that it has been annulled. When a deed is cancelled, everything which is done by the executant thereof is undone by the court. For all practical purposes, the contents of the deed wholly or in part are, so to say, effaced. If the plaintiff seeks such a relief, the suit is one under section 39. But the plaintiff may not be advised to seek a relief of such a drastic character, and it may be enough for his purposes to seek the relief of a limited nature described in section 42. The object of such a relief is to obtain a recognition of the plaintiff's right to property, and the void or voidable character of an instrument comes under consideration incidentally for determining the plaintiff's right. In taking such a course the plaintiff foregoes all the advantages conferred by the relief of cancellation and subjects himself to certain limitations imposed by section 42. It should be noted that section 39 does not, in terms, provide that where a plaintiff is able to claim a further relief, the court shall not grant

the adjudication claimed by him. Cases are easily conceivable in which a plaintiff may claim a relief of cancellation and may not claim any other relief, though he may be able to do so. Section 39 does not expressly provide, as is done by section 42, that his suit should on that account be dismissed. A plaintiff may obtain the cancellation of an instrument which he establishes to be forged, and may not claim any relief of injunction restraining the defendant from enforcing his supposed rights thereunder. Of course, the relief being discretionary, the court may not grant the relief of cancellation in the circumstances of a given case. It may also be that a plaintiff omitting to claim a further relief may be subsequently barred by order II, rule 2 of the Code of Civil Procedure. These are, however, matters beyond the purview of section 39, which itself does not compel a plaintiff to seek a further relief. On the other hand, section 42 entitles a plaintiff to ask for a comparatively limited relief, namely, that an instrument is void against him and does not affect his interests. Such a relief, if granted, has not the effect of completely annulling the document wholly or in part. The plaintiff merely safeguards his rights. The instrument will subsist and be effective for all purposes other than those declared by the decree. In certain cases, besides claiming a declaratory relief the plaintiff is in a position to claim also the relief of cancellation or the setting aside of a deed. In such cases, the suit may be liable to be dismissed.

That the relief that a certain sale is void against the plaintiff and does not affect his rights is not a relief of cancellation, but only a declaratory relief, has been held by their Lordships of the Privy Council in *Moti Lal v. Karrabuldin* (1), where their Lordships observed as follows: "Then the learned Judge holds that the suit is barred by article 12 of the Limitation Act, because

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(1) (1897) I.L.R., 25 Cal., 179(186).



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it is, or ought to be, one to set aside the sale of the 22nd of October, 1884. But the suit is founded on the fact that prior to that sale a valid sale of the same interests had been made to Masih, and that Moti took nothing because nothing was left to pass to him. The sale is not set aside, but is found not to affect the rights of the plaintiff derived from Masih. The sale does not purport to pass the rights of Masih or of the plaintiff, but those of the mortgagee Agha and the mortgagors Yusuf and Nasim, against whom Masih established his prior rights. *Between setting aside a sale and holding that the plaintiff's rights are not affected by it, there is a wide difference."*

In this passage their Lordships have clearly brought out the essential distinction between the cancellation or setting aside of a sale and the declaration that it does not affect the plaintiff's interests. Where the relief of declaration is granted, the sale is not set aside. It may or may not convey the interests of the person making it. If the person making it has no interest to transfer no interest is conveyed to the transferee. All that the plaintiff prays for, and the court declares, is that the plaintiff's interest is not thereby conveyed or in any way affected. Applying this dictum to the case before us, the plaintiff merely seeks a declaration that the deeds impugned by him do not convey or affect the interest of the plaintiff or the joint family, of which he is a member. He does not go further and ask the court to annul the deed. It is still open to the transferee to rely upon it against the executant thereof for a personal relief against him.

Where a plaint is not ambiguous or equivocal and the plaintiff expressly claims the relief of cancellation of an instrument, or on a proper construction of the plaint as a whole the court arrives at the conclusion that the suit is one for cancellation, and the plaintiff sticks to the allegation contained therein, no question can

arise and court fee for cancellation must be paid. Such was the case in *Akhlaq Ahmad v. Karam Ilahi* (1), decided by a Division Bench of which I was a member. I adhere to the view taken by me in that case.

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It seems to me to be an unheard of procedure that the court should force upon a plaintiff a frame of the suit which he is not willing to adopt. If the allegations contained in his plaint are such as to make it possible to hold that the suit is one for a declaration, the plaintiff is entitled to have it treated as such. If necessary, the court should direct the plaintiff so to amend it as to leave no doubt that the suit is one for declaration. After a plaintiff has declared unequivocally, by amendment or otherwise, that he desires no more than a declaratory relief of the nature described in section 42, the court must proceed on that footing for all purposes of court fee, leaving the plaintiff to take the consequences of his own action in deliberately instituting a declaratory suit where a suit for cancellation would have been more appropriate. If the question arises in the trial court, the plaintiff is entitled to make it clear by his pleadings what the nature of his suit is. If the question arises in a court of appeal, the position is not different in cases of ambiguously worded plaints. Consideration of the frame of the suit for the purposes of court fee and that for the purposes of decision of the suit must be kept severely apart. If the plaintiff says that he deliberately limits his relief to declaration, no impediment should be thrown in his way for that purpose. When the court comes to consider the merits of the case, it must pin down the plaintiff to his choice; and if he has made an error in that respect, he must take the consequences. But in determining the court fee payable the court should not allow its mind to be influenced by the consequences which might, in its opinion, follow from the

(1) (1934) I.L.R., 57 All., 638.

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plaintiff's action. Nor should the court be influenced by the consideration that the plaintiff is actuated by motives of economy and is evading payment of court fee by not suing for cancellation and suing only for a declaration. It is perfectly legitimate for the plaintiff to avoid the payment of higher court fee by so framing his suit as to diminish his liability in that respect.

Section 6 of the Court Fees Act can not, in my opinion, subject a plaintiff to liability to pay court fee for a relief which he does not ask for. If he claims both the reliefs of declaration and cancellation, as he may in certain cases, he must pay for both; but where, on the construction of his plaint in the light of his averment, the court comes to the conclusion that the plaintiff claims a declaratory relief and not cancellation of an instrument, there is nothing in section 6 which justifies a demand for two fees.

I have already referred to the substance of the plaintiff's claim as laid in the plaint, and to my mind it is at least possible to construe it as a suit for declaration. In answering the second question I shall have the occasion to go further and hold that it is a suit for declaration, but in answering the first I content myself with holding that it is, at least, consistent with the hypothesis that it is a suit for declaration. The plaintiff's counsel stated before us that his suit is one for declaration and should be treated as such, and that he will take all the consequences resulting from that frame of the suit. It was treated as a suit for declaration in both the courts below. In these circumstances, in my opinion, it is not open to us to treat the suit as one for cancellation—a relief which the plaintiff disclaims. This view is supported by a number of decisions of this Court. In *Radha Krishna v. Ram Narain* (1), decided by a Bench of which KING, J., was a member, the same view was taken. It should be noticed that in *Kalu Ram's* case (2) the

(1) (1931) I.L.R., 53 All., 552.

(2) (1932) I.L.R., 54 All., 812.

judgment of the Full Bench case was delivered by KING, J. In *Brij Gopal v. Suraj Karan* (1), decided by a Division Bench of this Court of which my brother BENNET was a member, it was held that for the purposes of determination of the court fee the actual relief asked for should be looked into and it is entirely beside the consideration of the court whether the suit is likely or not to fail because the plaintiff did not ask for a consequential relief. In *Lakshmi Narain Rai v. Dip Narain Rai* (2) observations to the same effect were made. It was a case of a decree; but the actual decision did not rest on that ground. In *Abdul Samad Khan v. Anjuman Islamia, Gorakhpur* (3), decided by a Bench of this Court of which my brother RACHHPAL SINGH and myself were the members, the same view was taken.

My view finds support from the latest Full Bench case, *Sri Krishna Chandra v. Mahabir Prasad* (4). The learned CHIEF JUSTICE, who delivered the judgment of the Full Bench, observed as follows: "Obviously the Full Bench" [in *Kalu Ram's* case (5)] "did not intend to lay down that where the plaintiff deliberately omits to claim a consequential relief and contents himself with claiming a mere declaratory decree, the court can call upon him to pay court fees on the consequential relief which he should have claimed although he has omitted to do so. What was held was that if the plaintiff does not ask for a mere declaratory decree, but also asks for a relief which he calls 'consequential' relief, the mere fact that he calls it so would not prevent the court from demanding full court fee, if in reality the additional relief claimed was a substantive relief and not a mere consequential relief. We do not think that the observation was intended to go further than this."

For the reasons stated above, I answer the first question in the negative and hold that it is not open to the

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(1) [1932] A.L.J., 466.

(2) (1932) I.L.R., 55 All., 274.

(3) [1933] A.L.J., 1537.

(4) (1933) I.L.R., 55 All., 791(794).

(5) (1932) I.L.R., 54 All., 812.

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court to treat the suit as one for cancellation, contrary to the assertion of the plaintiff which is not inconsistent with the substance of the plaint.

The second question depends upon the right construction of the plaint, which should be considered as a whole. In my opinion, the relief claimed by the plaintiff is a declaration of his right to the property transferred by the third defendant, and that the transfers evidenced by the sale deeds executed by the latter did not affect the plaintiff's rights or the rights of the joint family, of which he is a member. The plaintiff intended to claim a relief of declaration and no more, and he expressed his intention in words which did not take the case out of the category of declaratory suits. He could not avoid reference to the sale deeds in asking for the declaration of his right, and a mere reference to the sale deeds cannot make the suit otherwise than one for declaration. I have already referred to the illustrations to section 42, which clearly contemplate a relief couched in terms employed by the plaintiff in this case. If the plaintiff had made no reference to the "sale deeds" in the relief paragraph of the plaint and had mentioned only the "sales" which are detailed in the body of the plaint, there would have been no substantial difference. It cannot be the law that if the plaintiff avoids a reference to the deed in the last paragraph of the plaint but attacks it in the earlier parts of it the suit is one for declaration, otherwise it is a suit for cancellation. If such be the law, it can be very easily circumvented. The plaintiff can make every necessary allegation in the earlier paragraphs of the plaint and so word the reliefs as to avoid pointed reference to the deed itself. I hold that the court fee of Rs.10 for each of the two reliefs claimed by the plaintiff was sufficient under article 17(iii), schedule II of the Court Fees Act, and that *ad valorem* court fee on the value of the subject-matter is not the proper court fee.

BENNET, J.:—This is a reference in regard to the court fee paid by the plaintiff in the trial court and as appellant in first appeal. The plaint sets out that the plaintiff is a minor and that the plaintiff and his brother Komal formed a joint Hindu family owning four houses left by their father, and Komal executed two sale deeds of his half share in two houses without legal necessity, but that plaintiff is in possession of the houses. A declaratory court fee of Rs.20 was paid. The relief asked was: "It may be declared that by virtue of the purchase made under the sale deed, dated the 24th October, 1931, in favour of defendant 1, and under the sale deed, dated the 21st October, 1931, in favour of defendant 2, which are null and void and ineffectual against the plaintiff and the joint family property, defendants 1 and 2 did not acquire any right to any part of the houses mentioned below." The question raised is whether the plaint comes under the Court Fees Act, schedule II, article 17(iii) as a plaint "to obtain a declaratory decree where no consequential relief is prayed", or whether it comes under the residuary article, article 1 of schedule I, as a plaint "not otherwise provided for in this Act". In the former case a fee of Rs.10 is sufficient for each declaration. In the latter case an *ad valorem* court fee must be paid on the value of the subject-matter.

Two issues were framed by the referring order: (1) Where a plaint is so worded as to disclose a suit falling either under section 39 or section 42 of the Specific Relief Act, is it open to a court to treat the suit as one falling within the purview of section 39, if the plaintiff desires it to be construed as one under section 42? (2) Whether the court fee payable on the plaint and the memorandum of appeal in the lower appellate court in this case should be *ad valorem* on the value of the subject-matter, or Rs.10 only under article 17(iii), schedule II of the Court Fees Act?

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The questions which have been argued concern the construction of sections 39 and 42 of the Specific Relief Act, and how far this present Bench of three Judges is bound by the recent Full Bench ruling of five Judges in *Kalu Ram v. Babu Lal* (1), and of three Judges in *Sri Krishna Chandra v. Mahabir Prasad* (2). In the former case the first question referred was: "What provisions of the Court Fees Act determine the court fee payable in respect of relief No. 1, i.e. that the mortgage deed in suit may be declared void and ineffectual as against the plaintiffs, and that it may be cancelled?" On page 819 of the report an earlier Full Bench ruling of five judges was considered, *Karam Khan v. Daryai Singh* (3), and was overruled in the following words: "The report of the case is very brief and the judgment is also very short. The original plaint in the vernacular is not available in this Court. If the learned Judges meant to lay down that a suit for the cancellation of an instrument under the provisions of section 39 of the Specific Relief Act was a mere declaratory suit under schedule II, article 17(iii), then with great respect we are unable to agree with that view. The only reported cases brought to our notice in which this ruling has been followed are *Hira Lal v. Wali Bhagat* (4), and *Durga Bakhsh v. Mirza Mohammad Ali Beg* (5). We may point out that the Full Bench ruling has been expressly dissented from by some of the other High Courts, *vide Samiya Mavali v. Minammal* (6), *Parvatibai v. Vishvanath Ganesh* (7) and *Musammat Noowoagar v. Shidhar Jha* (8)."

The ruling then proceeds to set out the two sections, 42 and 39 of the Specific Relief Act and contrast them. Of section 39 it is stated at pages 820, 821 of the report: "It is equally clear that a plaintiff need only ask for

(1) (1932) I.L.R., 54 All., 812.  
(3) (1883) I.L.R., 5 All., 331.  
(5) (1898) 1 Oudh Cases, 123.  
(7) (1904) I.L.R., 29 Bom., 207.

(2) (1933) I.L.R., 55 All., 791.  
(4) Weekly Notes 1889, p. 124.  
(6) (1899) I.L.R., 23 Mad., 490.  
(8) (1918) 3 Pat. L.J., 194.

the instrument to be adjudged void or voidable, and need not in express terms ask for it to be delivered up and cancelled." It is to be noted that the ruling did not say that the amount of the court fee depended on whether the plaintiffs asked for cancellation or not; on the contrary the ruling implies that asking for cancellation makes no difference: "Even though no relief of cancellation is asked for, a court may grant cancellation also." When the ruling sums up the conclusion it does so without reference to a prayer for cancellation: "A relief to have a registered instrument adjudged void or voidable, with the possible result of its being delivered up and cancelled and a copy of the decree being sent to the registration office for a note to be made by the registering officer in his books, is much more than a mere declaratory relief. It is undoubtedly a substantial relief of a nature differing from a declaratory one."

The argument made for the plaintiff that this ruling only deals with a case where the plaintiff also asks for cancellation, and not with a case like the present where cancellation is not asked for, appears to me to be incorrect, as the ruling shows that the fact that cancellation was asked for was treated as merely incidental and not as a determining factor. The ruling clearly distinguished any suit for having a written instrument adjudged void or voidable from a declaratory suit. The ruling proceeds to state: "We may note that section 39 of the Specific Relief Act is in chapter V which is headed 'Of the cancellation of instruments', whereas there is a separate chapter VI headed 'Of declaratory decrees'. Obviously the legislature intended to draw a distinction between a decree adjudging a written instrument void or voidable, which may result in its cancellation, and a mere declaratory decree. Though the Specific Relief Act was passed some years after the Court Fees Act, the distinction existed before the Specific Relief Act was

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passed and it cannot be said that for the purposes of the Court Fees Act a relief for adjudging an instrument void is of a declaratory nature." On page 822 it is stated: "In our opinion, where a suit is for the cancellation of an instrument under the provisions of section 39 of the Specific Relief Act the relief is not a declaratory one. It falls neither under section 7(iv)(c) nor under schedule II, article 17(iii), but under the residuary article, namely schedule I, article 1, of the Court Fees Act."

In *Sri Krishna Chandra v. Mahabir Prasad* (1) there was a decision by a Full Bench of three Judges, including the learned CHIEF JUSTICE, in a case where no written instrument was concerned, but where the plaintiff asked for a declaration that a previous decree in a suit, in which he was represented by a guardian, was not binding upon him. It was held that this was a suit for a mere declaratory decree and came under schedule II, article 17(iii). On page 794 reference was made to *Kalu Ram v. Babu Lal* (2), and it was stated: "On the other hand, there is no doubt that so far as suits relating to the cancellation of instruments are concerned, the Full Bench on page 821 clearly held that 'A relief to have a registered instrument adjudged void or voidable, with the possible result of its being delivered up and cancelled and a copy of the decree being sent to the registration office for a note to be made by the registering officer in his books, is much more than a mere declaratory relief. It is undoubtedly a substantial relief of a nature differing from a declaratory one.' It was clearly pointed out that it was not incumbent on a plaintiff to ask in express terms a relief for the instrument to be delivered up and cancelled and that he might merely ask for its being adjudged void or voidable. Nevertheless, a suit which falls under section 39 of the Specific Relief Act was held not to be a suit for

(1) (1933) I.L.R., 55 All., 791.

(2) (1932) I.L.R., 54 All., 812.

obtaining a mere declaratory decree, but one for obtaining a substantive relief not otherwise provided for."

The following differences between sections 39 and 42 may be set out: (1) section 39 is in chapter V headed "Of the cancellation of instruments". Section 42 is in chapter VI headed "Of declaratory decrees". If a suit under section 39 was a suit for a declaratory decree, why was that section not included in the chapter on declaratory decrees? (2) Section 39 deals with written instruments, section 42 does not refer to written instruments. Section 42 refers only to suits by a person to have a declaration of his title "to any legal character, or to any right as to any property". That is, section 42 is for a declaration of the rights of the *plaintiff*. But section 39 is for adjudication that a written instrument is void or voidable and that *defendants* derive no rights from it. (3) Under section 39 the court may order cancellation. There is no such result possible under section 42. Of the illustrations to section 42, (d) and (e) deal with cases where instruments are mentioned. In these cases a person with a limited interest makes an alienation, and a reversioner may obtain a declaration that the alienation will be void beyond the lifetime of the executant. But the alienation is valid for the lifetime of the executant and operates on the whole property for that period. Such a suit cannot come under chapter V because there is no present right of the plaintiff to have the instrument adjudged void or voidable. The concern of the plaintiff is only with the future and not with the present, and hence he is only entitled to a mere declaration and not to any substantive relief. These cases differ from those provided for in section 40 which deals with an instrument which may be adjudged void or voidable at the time of suit as regards some of the rights and obligations under it and held good as regards others. The difference is that in the illustrations (d) and (e) to section 42 there are no rights and

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obligations which can be adjudged void or voidable at the time of suit; only for the future can a declaration be granted that the rights, valid at the time of suit, will cease to exist on the happening of a certain contingency—the termination of the life of the executant.

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In regard to the argument that illustration (f) may refer to an adoption by a Hindu widow evidenced by a registered instrument, it is sufficient to say that the illustration does not mention any such instrument, and an adoption cannot be made by a written instrument but must be made by certain ceremonies. An instrument which merely recited that an adoption had taken place would not legally effect the adoption by such recital. Chapter V refers to instruments, meaning thereby legal documents which have a legal effect, and not mere statements. As regards illustration (c), where A covenants that if he in future becomes entitled to property exceeding one lakh of rupees, he will settle it upon certain trusts, it is not correct to argue that the covenant must be in a written instrument such as is contemplated by chapter V, and the illustration (c) does not mention a written instrument. Another argument was that the Full Bench in *Kalu Ram v. Babu Lal* (1) treated a decree as an instrument within the meaning of section 39. There were two questions referred, the first dealing with cancellation of a mortgage deed, and only in regard to this is section 39 mentioned. The second question dealt with the cancellation of a compromise and a decree, and the ruling begins to consider this second question on page 823 from the words "As regards the second relief". It is only in regard to the cancellation of the compromise that it is stated to be similar to the cancellation of the mortgage deed. The next paragraph considers the decree and says that "cancellation" is not the correct word, and the

(1) (1932) I.L.R., 54 All., 812.

word should be "setting aside". No reference is made to section 39 in regard to the decree.

I may note that it is incorrect to describe the reference as involving the question whether it is open to a court to compel a plaintiff to ask for consequential relief if the plaintiff has asked for a mere declaration. Of course a court cannot act in such a manner. No one has suggested that it could, and that is not the case for the learned Government Advocate, nor is that the question in the first issue referred to us. That question deals with the construction of the plaint as it stands, and whether it is for the court or for the plaintiff to construe it. The contest is not one between a mere declaration without consequential relief and one with consequential relief. It is a contest between a mere declaration and a substantive relief. Another argument is that for the purpose of deciding whether the court fee is sufficient or not the court should confine its attention to the provisions of the Court Fees Act and should not refer to the provisions of any other Act. The Court Fees Act in schedule II, article 17(iii) fixes a court fee for a suit for "a declaratory decree where no consequential relief is prayed". But the Court Fees Act does not define what is a declaratory decree. Therefore it is necessary to refer to an Act which does define a declaratory decree, that is the Specific Relief Act, to see whether the plaintiff asks for a declaratory decree.

In regard to the plaintiff's argument that cancellation must be asked for in the plaint otherwise the suit is for a mere declaration, it is to be noted that if an instrument is adjudged void so far as the plaintiff is concerned, even though there is no order that it be given up and cancelled, still the effect of the order is that so far as the plaintiff is concerned the instrument *is* cancelled and no longer exists. It is for this reason also that a suit under section 39 is not a suit for a mere declaratory decree. It may be noted that if the plaintiff obtained a decree on his present plaint to the effect that the instru-

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ments were void, then the court would undoubtedly order cancellation as the instruments would serve no purpose whatever. The present is not a case such as is mentioned in section 40 where an instrument is evidence of different rights or different obligations, when a court may cancel part and allow the residue to stand.

The rule laid down in these two Full Bench rulings has been interpreted to cover a plaint where the relief is asked that a written instrument should be adjudged void, although no relief of cancellation was asked, in *Suraj Ket Prasad v. Chandru* (1). On page 956 it is stated in the judgment delivered by the learned CHIEF JUSTICE: "There is no doubt that the plaintiff in asking for a declaration that the compromise, dated the 20th November, 1919, was improper and void as against the plaintiff, was asking for the cancellation of this instrument." And an *ad valorem* court fee was payable under schedule I, article 1. A similar view was taken by Mr. Justice COLLISTER in *Akhlaq Ahmad v. Karam Ilahi* (2), as regards the particular plaint in that case which only asked for the sale deed executed by the plaintiff, a pardanashin woman, to be declared void and ineffectual against her on the ground that she did not mean to execute it. Mr. Justice COLLISTER based his opinion on general grounds (page 644): "It appears to me that the observations by the Full Bench in the case of *Kalu Ram v. Babu Lal* (3), though more or less obiter, since there was a prayer for cancellation, are authority for the proposition that a suit under section 39 of the Specific Relief Act for avoiding an instrument, even if there be no prayer for cancellation, carries with it by implication a prayer that the court may further use the discretion given to it by section 39 so as to order the said instrument to be delivered up and cancelled."

I do not think it is correct to describe the rule laid down by the Full Bench as "more or less obiter",

(1) [1934] A.L.J., 955.

(2) (1934) I.L.R., 57 All., 638.

(3) (1932) I.L.R., 54 All., 812.

because I consider that the Full Bench had jurisdiction to consider which of the factors in the case referred to them were the determining factors, and the Full Bench held that the relief of asking for the instrument to be adjudged void or voidable was the determining factor, and not the relief of asking for cancellation; see page 820 of I. L. R., 54 Allahabad: "It is equally clear that a plaintiff need only ask for the instrument to be adjudged void or voidable and need not in express terms ask for it to be delivered up and cancelled." Mr. Justice NIAMAT-ULLAH on the other hand held on page 646 of I. L. R., 57 Allahabad: "To my mind it is open to a plaintiff to sue for a declaration that a document is void or voidable without making it a suit falling within the purview of section 39, Specific Relief Act. It may be that such a suit is, in certain circumstances, liable to be dismissed under the proviso to section 42 of that Act on the ground that the plaintiff, being able to seek a further relief (e.g., cancellation) than a mere declaration, omits to do so." The same view has been expressed by Mr. Justice NIAMAT-ULLAH and Mr. Justice RACHHPAL SINGH in *Abdul Samad Khan v. Anjuman Islamia, Gorakhpur* (1). This ruling referred to two decisions subsequent to the Full Bench decision in *Kalu Ram v. Babu Lal* (2), which were mentioned as authority for the distinction on which the ruling was based. These decisions were *Lakshmi Narain Rai v. Dip Narain Rai* (3), and *Sri Krishna Chandra v. Mahabir Prasad* (4). Both these rulings deal with cases where a declaration was asked for in regard to a decree, and it was held that such a declaration came under schedule II, article 17 (iii). In the ruling in *Sri Krishna Chandra v. Mahabir Prasad* (4), at pages 794-795 where the Full Bench considered the law relating to written instruments, the Full Bench ruling of *Kalu Ram v. Babu Lal* (2) was interpreted in a sense contrary to the sense

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(1) [1933] A.L.J., 1537.

(3) (1933) I.L.R., 55 All., 274.

(2) (1932) I.L.R., 54 All., 812.

(4) (1933) I.L.R., 55 All., 791.

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placed on it in *Abdul Samad Khan v. Anjuman Islamia, Gorakhpur* (1), where it is confined to a case where the plaintiff sues for the relief of cancellation. It was held that the plaintiff not having sued for cancellation, but only for a "declaration" that a deed of gift by a third party to defendant No. 1 was illegal and ineffectual as against the plaintiff and that the defendants had no right to interfere with the possession of the plaintiff, the declaratory court fee under article 17(iii) of schedule II was sufficient.

Learned counsel for plaintiff also relied on *Arunachalam Chetty v. Rangasawmy Pillai* (2). That was a case where a creditor obtained a decree on a hypothecation bond executed by the father of a joint Hindu family, and the plaintiffs who were then minors, as they alleged, sued for a declaration that the debt was not binding on the family and that the decree was a nullity, and for an injunction to restrain the defendant from executing the decree. It was held that mere declaratory court fee under schedule II, article 17(iii) was not sufficient, and fee must be paid under section 7(iv)(c) for a declaratory decree with consequential relief. That case is distinguishable from those with which we have been dealing, because in that case the mortgage had merged in the decree in the mortgage suit. With great respect to the learned Judges of this High Court who have drawn this distinction between (1) a suit for "declaration" that a written instrument is void or voidable with an implication that the plaintiff wants cancellation, and (2) a suit for "declaration" that a written instrument is void or voidable if the plaintiff desires it to be construed as not asking for cancellation, the result being that *ad valorem* court fees are due on (1) but not on (2). I find that I cannot agree with this view and I think that this view is opposed to what has been laid down by the Full Bench of five Judges of this High Court in *Kalu Ram v. Babu Lal* (3),

(1) [1933] A.L.J., 1537.

(2) (1914) I.L.R., 38 Mad., 922.

(3) (1932) I.L.R., 54 All., 812.

and I consider that the rule laid down there governs the present case. The rule that the court has to construe such complaints and decide whether the complaint falls under (1) or (2) is a rule which would be highly artificial and difficult in practice. Moreover the rule appears to vary considerably. In *Akhlaq Ahmad v. Karam Ilahi* (1), it was stated that the court had to construe the complaint for this purpose: "In each case the question is one of construction of the complaint and of ascertaining the relief which the plaintiff is claiming". But in the first question referred in the present case the suggestion is that it is not open to the court to construe the complaint for this purpose if the plaintiff desires it to be construed as one under section 42 of the Specific Relief Act.

For ascertainment of court fee rules ought to be clear and precise. The rule laid down by the Full Bench in *Kalu Ram v. Babu Lal* (2) is quite clear and precise and can be understood by anyone, and easily applied. It was there laid down that if a suit comes under section 39 of the Specific Relief Act an *ad valorem* court fee must be paid, and that it does not matter whether the plaintiff asks for cancellation or not. This rule is based on the essential distinction between suits under section 39 and section 42. Suits under section 39 are not in chapter VI which treats of declaratory suits, and the word "declaration" is not used in section 39; the words are "have it *adjudged* void or voidable". Suits under chapter V may perhaps result in a decree that the written instrument is void or voidable without an order for delivery and cancellation. But such a decree does in effect cancel the instrument so far as the plaintiff is concerned, and it appears that for this reason the second paragraph of section 39 would always apply, and on making such an adjudication the court should always send a copy of its decree to the registering officer where the instrument has been registered. The words used in this second paragraph are, "the court shall also send a copy of its decree to the officer" etc.

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(1) (1934) I.L.R., 57 All., 638(645).

(2) (1932) I.L.R., 54, All., 812.



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The reason why this is always necessary is in order that any one to whom the defendant offers to transfer the property should be able from a search in the registration office to ascertain that there had been a decree by which a court had adjudged that the instrument did not affect the rights of a certain person.

The first question referred may now be considered. The question postulates that a plaint may be "so worded as to disclose a suit falling either under section 39 or section 42 of the Specific Relief Act." I do not think that a suit can be so worded, because section 39 deals with written instruments and section 42 does not. The cause of action for section 39 is the execution of the written instrument. The cause of action for section 42 is the denying or being interested to deny the plaintiff's title to some legal character or right. If the plaint is to come under section 39 at all it must ask the court to adjudge that a written instrument is void or voidable. If it does ask that, then the plaint is clearly one under section 39, and the addition of any other relief for a declaration under section 42 would not alter its character as a plaint under section 39. If the plaint does not ask the court to adjudge a written instrument void or voidable, and if it is not necessary for the court to do so in order to grant the relief for which the plaint asks, then the plaint does not come under section 39. My first answer to question No. 1 is, therefore, that such a case could not arise. As the question assumes that such a question could arise. I will proceed to answer it as a hypothetical case, in which it is assumed that a plaint would be so worded that the plaint could be read as falling under section 39, for adjudging a written instrument void or voidable, or under section 42, for some other declaration without adjudging a written instrument void or voidable against the plaintiff. The reply to this hypothetical question is contained in section 6 of the Court Fees Act ". . . no document of any of the kinds specified as chargeable in the first or second schedule . . . shall be filed . . . unless in respect of such document there be paid a fee of an

amount not less than that indicated by either of the said schedules as the proper fee for such document." Schedule I is headed "*Ad valorem* fees". Schedule II is headed "Fixed fees". The last few lines therefore mean "not less than either the *ad valorem* fee or the fixed fee", where the document would come under either schedule. This section lays down for such a document that it must satisfy two minima, one under each schedule. The fee of Rs.10 complies with the rule that it is not less than that indicated by the second schedule. But how can it be said that it is not less than that indicated by the first schedule? The fee must satisfy both schedules where the document can come under either. If the section had meant that it would be sufficient if the fee satisfied one schedule only, it would have stated: "unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules, *whichever is least*, as the proper fee for such document." It is not possible to read these words into section 6 when the words are not there. Without these words the section clearly indicates that where a document comes under either schedule the court fee must not be less than what each schedule prescribes. There are no rulings on this section on this point, or at least none were produced. My second answer therefore to the hypothetical case in question No. 1 is that section 6 of the Court Fees Act would apply, and as the word in that section is "shall", the court and the plaintiff have no option and the court fee under section 39, an *ad valorem* court fee, must be paid.

The second question deals with the present case and asks whether the plaint and memorandum of appeal in the lower appellate court require an *ad valorem* court fee or fixed fee. I consider that an *ad valorem* court fee is required for the following reasons:

(1) The present case is governed by the Full Bench ruling of *Kalu Ram v. Babu Lal* (1).

(1) (1932) I.L.R., 54 All., 812.

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(2) A relief to have a written instrument adjudged void or voidable comes under section 39 of the Specific Relief Act and requires an *ad valorem* court fee under article 1, schedule I of the Court Fees Act.

(3) It is immaterial whether the plaint asks for the relief of cancellation or not, because if adjudged void or voidable the written instrument is cancelled so far as the plaintiff is concerned.

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RACHHPAL SINGH, J.:—The two questions which are referred to the Full Bench are:

1. Where a plaint is so worded as to disclose a suit falling either under section 39 or section 42 of the Specific Relief Act, is it open to a court to treat the suit as one falling within the purview of section 39 of the Specific Relief Act, if the plaintiff desires it to be construed as one under section 42 of the Specific Relief Act?

2. Whether the court fee payable on the plaint and the memorandum of appeal in the lower appellate court in this case should be *ad valorem* on the value of the subject-matter, or Rs.10 only under article 17(iii), schedule II of the Court Fees Act.

In the opinion of the learned Judges who referred this case to a Full Bench there appeared to be some divergence of opinion as regards the construction to be placed on the earlier Full Bench in *Kalu Ram v. Babu Lal* (1), and *Sri Krishna Chandra v. Mahabir Prasad* (2), which was indicated by the judgment in *Akhlaq Ahmad v. Karam Ilahi* (3).

Section 7, sub-clause (iv)(c) of the Court Fees Act enacts that in suits to obtain a declaratory decree or order where consequential relief is prayed, the court fee shall be paid according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. And for this purpose it is enjoined that in such a suit the plaintiff shall state the amount at which he values

(1) (1932) I.L.R., 54 All., 812.

(2) (1933) I.L.R., 55 All., 791.

(3) (1934) I.L.R., 57 All., 638.

the relief sought. Article 17, clause (iii), schedule II prescribes that a court fee of Rs.10 shall be paid in suits which are instituted to obtain a declaratory decree where no consequential relief is prayed for.

Section 6 of the Court Fees Act enacts that "Except in the courts hereinbefore mentioned, no document of any of the kinds specified as chargeable in the first or second schedule to this Act annexed shall be filed, exhibited or recorded in any court of justice or shall be received or furnished by any public officer, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document."

It will be seen that the section imposes a duty on courts to see that no document which is chargeable with court fee under the first and second schedules of the Court Fees Act is received or issued unless the requisite court fee has been paid.

Now when a plaint in which a declaratory relief is asked for is presented to a court, it has to decide whether the case is one in which a plaintiff seeks to obtain a decree or order where a consequential relief is prayed, or is the case one where he seeks a mere declaratory decree without praying for a consequential relief? If the case appears to be one in which a consequential relief is prayed, then the court fee payable will be *ad valorem* on the amount at which the relief sought is valued in the plaint or memorandum of appeal, in accordance with the provisions of section 7, sub-clause (iv)(c) of the Court Fees Act. On the other hand where the plaint or the memorandum of appeal shows that the plaintiff seeks to obtain a declaratory decree with no consequential relief, then the court fee will be Rs.10, with reference to the provisions of article 17, clause (iii) of schedule II of the Court Fees Act.

When a plaint is presented to a court in which a declaratory relief is sought, the first thing which it has to decide is whether the court fee paid is sufficient. In

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order to decide this question the court must look into the allegations made in the plaint, and for the purpose of deciding the question of sufficiency or otherwise of the court fee paid it will be assumed that the allegations made in the plaint are correct. The court at that stage is not entitled to go into the question of the truth or falsity of the case set up by the plaintiff. In *Lakshmi Narain Rai v. Dip Narain Rai* (1), a Bench of two learned Judges of this Court observed that "the question of court fee must be decided on the plaint and the decision is not affected by the question whether the suit is maintainable under section 42 of the Specific Relief Act, or by any action subsequently taken by the plaintiff to obtain an injunction otherwise than by amendment of the plaint."

In *Venkata Ramani Iyer v. Narayanaswami Iyer* (2), it was remarked that "The determination of the category to which a suit belongs must depend upon the relief which the plaintiff prays for, because court fees must be determined with reference to the prayer contained in the plaint. The court must ascertain what the plaintiff actually asks for in his plaint and must not speculate what may be the ulterior effect of his success."

It appears to me that it is a well settled rule of law now that courts have ample power to decide on averments in the plaint whether the remedy for consequential relief has been sought. A plaint may on the face of it show that the plaintiff is only seeking to obtain a declaratory decree without asking for any consequential relief. But the substance of the plaint may demonstrate that as a matter of fact he is asking not only for a mere declaration but for consequential relief as well. The court will look to the substance and not merely to the form of the plaint.

It is now further well settled that if the plaint shows that a plaintiff is asking not only for a mere declaration but also for a consequential relief, then he must pay *ad*

(1) (1932) I.L.R., 55 All., 274(277). (2) (1924) 87 Indian Cases, 660.

*valorem* court fee. In *Kalu Ram v. Babu Lal* (1), the Full Bench made the following observations: "The court has to see what is the nature of the suit and of the reliefs claimed, having regard to the provisions of section 7 of the Court Fees Act. If a substantive relief is claimed, though clothed in the garb of a declaratory decree with a consequential relief, the court is entitled to see what is the real nature of the relief, and if satisfied that it is not a mere consequential relief but a substantive relief, it can demand the proper court fee on that relief, irrespective of the arbitrary valuation put by the plaintiff in the plaint on the ostensible consequential relief." I have no doubt in my mind that a court has ample power to decide, for the purpose of determining the court fee to be paid, whether in substance a plaint is one in which (1) a mere declaratory relief is claimed, or (2) declaratory relief combined with a consequential relief is claimed, or (3) declaratory relief plus substantive relief is claimed.

The next question which we have to consider is whether a court can insist that a plaintiff should frame his suit in such a manner so as to include a prayer for a consequential relief. On the decision of this question would depend the answer to be given to the first question referred to the Full Bench.

In *Deokali Koer v. Kedar Nath* (2), Sir LAWRENCE JENKINS, C.J., delivering the judgment of the Full Bench observed: "It is a common fashion to attempt an evasion of court fee by casting the prayers of the plaint into a declaratory shape. Where the evasion is successful it cannot be touched, but the device does not merit encouragement or favour."

In *Venkata Ramani Iyer v. Narayanaswami Iyer* (3), the learned Judge of the Madras High Court held that "Where a plaintiff is bound to ask both for a declaration and the setting aside of a document but prays merely for declaration, the suit must be treated for purposes of

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(1) (1932) I.L.R., 54 All., 812(822). (2) (1912) I.L.R., 39 Cal., 704(707).  
(3) (1924) 87 Indian Cases, 660.

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court fee as one for a declaration. It is not for the court to say that the plaintiff should have framed his plaint differently and that if he had done so a higher court fee would have been payable and that, therefore, the plaint before the court should be treated as containing a prayer which it does not in truth contain. If a plaintiff contents himself with asking for a declaration, where he ought to ask for a declaration and consequential relief, the suit is liable to be dismissed not by reason of the improper valuation of the suit, but because it infringes the provisions of section 42 of the Specific Relief Act."

In *Pathuma Umma v. Aliyammakkanath Moideen* (1), a Bench of two learned Judges of the Madras High Court held that "In the case of an enactment for revenue purposes such as the Court Fees Act, it cannot be said that it is not open to parties to avail themselves of any camouflage that the law allows or does not forbid for escaping liability for court fees."

In *Tikait Narayan Singh v. Nawab Dildar Ali Khan* (2), a Bench of two learned Judges of the Patna High Court decided that: "The question of court fee must be decided on the plaint; and though it is open to the court to say that the plaintiff has really asked for a consequential relief, though he has tried to conceal it by casting the reliefs in a particular form, it is not open to the court to say that the plaintiff should have asked for a consequential relief and should have paid the proper fee as in such a suit. Here the plaintiff insists that it is not necessary for him to ask for a consequential relief. Although he takes a risk in so insisting, in that he is liable to have his suit dismissed under section 42 of the Specific Relief Act if the court ultimately comes to the conclusion that it was open to him to ask for a consequential relief, he is entitled to have the case made by him in the plaint tried by the courts."

(1) (1927) 110 Indian Cases, 752.

(2) (1924) I.L.R., 3 Pat., 915(928).

In *Radha Krishna v. Ram Narain* (1) a Bench of two learned Judges of this Court held that "The question of court fee must be decided on the plaint and the decision is not affected by the question whether the suit is maintainable under section 42, or by any action subsequently taken by the plaintiff to obtain an injunction otherwise than by amendment of the plaint."

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In *Mohammad Ismail v. Liyaqat Husain* (2), it was held that "The question of court fees must be determined with reference to the plaint as it is and not as it ought to have been. If, having regard to the nature of his claim, plaintiff ought to have claimed consequential relief and has not done so, his suit might fail under the proviso to section 42 of the Specific Relief Act; but the court cannot say that the plaintiff should have claimed consequential relief, and not having done so he should be deemed to have claimed the consequential relief and was therefore liable to pay an *ad valorem* court fee on the consequential relief."

In *Akhlaq Ahmad v. Karam Ilahi* (3), we find the following observations: "If a plaintiff deliberately prays for a mere declaration that an instrument is void and if the circumstances of the case are such that the document can be completely annulled, he is, at least, 'able' to have the instrument adjudged void, which implies that a copy of the decree annulling it shall be sent to the registration office for a note to be made on the copy therein retained, so that anyone searching and inspecting the registration office may at once find out that the document, though subsisting at one time, was subsequently annulled. In such a case his suit may be dismissed, being barred by the proviso to section 42 of the Specific Relief Act. But, for all purposes of court fee, it is not open to a court to say that the plaintiff must be taken to have done what he should have done, though he persists in saying that he does not sue for cancellation."

(1) (1931) I.L.R., 53 All., 552 (559). (2) [1932] A.L.J., 165.  
(3) (1934) I.L.R., 57 All., 638(646).



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In *Sri Krishna Chandra v. Mahabir Prasad* (1), the CHIEF JUSTICE, who delivered the judgment of the Full Bench, made the following observations: "The learned advocate for the respondents has relied strongly on a passage at page 822 in *Kalu Ram v. Babu Lal* (2), where it was remarked that 'If a substantive relief is claimed, though clothed in the garb of a declaratory decree with a consequential relief, the court is entitled to see what is the real nature of the relief, and if satisfied that it is not a mere consequential relief but a substantive relief it can demand the proper court fee on that relief, irrespective of the arbitrary valuation put by the plaintiff in the plaint on the ostensible consequential relief.' Obviously, the Full Bench did not intend to lay down that where the plaintiff deliberately omits to claim a consequential relief and contents himself with claiming a mere declaratory decree, the court can call upon him to pay court fees on the consequential relief which he should have claimed although he has omitted to do so. What was held was that if the plaintiff does not ask for a mere declaratory decree, but also asks for a relief which he calls 'consequential' relief, the mere fact that he calls it so would not prevent the court from demanding full court fee, if in reality the additional relief claimed was a substantive relief and not a mere consequential relief. We do not think that the observation was intended to go further than this."

A perusal of the above mentioned cases makes it abundantly clear that it is perfectly open to a plaintiff to frame his suit in such a manner as to avoid a prayer for a consequential relief. Section 42 of the Specific Relief Act enacts that "Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for

(1) (1933) I.L.R., 55 All., 791(794). (2) (1932) I.L.R., 54 All., 812.

any further relief; provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so." It appears to me that at the time when the question as regards the sufficiency or otherwise of the court fee paid arises, the court is fully competent to find out as to whether or not any consequential relief has been claimed in reality. If it finds that consequential relief has been claimed, then certainly the plaintiff will be liable for payment of *ad valorem* court fee. But if, on the other hand, the plaintiff deliberately takes care not to ask for a consequential relief, then it is not the function of the court to insist that the consequential relief should have been asked. Where consequential relief has been deliberately omitted, it would be wrong to say that a plaintiff should be deemed to have asked for that relief when he studiously refrains from asking it. It may be that later on the court may come to the conclusion that it was a case in which a further relief than a mere declaration of title should have been asked. In that case the penalty is provided for by the proviso to section 42 of the Specific Relief Act which enacts that the court may refuse to make a declaration. Whenever there is a case of this description it is always open to the court to throw out the suit on the ground that "further relief than a mere declaration of title should have been asked for". A large number of defective suits are instituted, but there is no law under which the duty of giving advice to a party instituting the suit has been imposed upon courts. A plaintiff putting forward a defective plaint does so at his own risk. I think that the correct view is that when a plaint is filed, then what the court has to see is whether it is a suit in which the plaintiff asks for a mere declaration without any consequential relief or whether he asks for a declaration with consequential relief. In the first case the court cannot compel the plaintiff to pay more than Rs.10 even if it is of opinion that the suit is defective because no consequen-

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tial relief has been asked for. The court is under the law bound to receive the plaint. The powers of a court not to receive documents are defined in section 6 of the Court Fees Act. If a plaint deliberately avoids any reference to consequential relief, then I do not see how having regard to the provisions of section 6 of the Court Fees Act the court can refuse to admit the plaint. Under section 6 of the Court Fees Act the courts are enjoined among other things not to receive documents insufficiently stamped. When a plaint in a declaratory suit is presented, the court has only to see whether in substance the plaint is one on which an *ad valorem* court fee has to be paid or only a duty of Rs. 10. The court is under no obligation to insist on giving advice to the plaintiff presenting the plaint that he should amend his plaint so as to pray for a consequential relief. I further apprehend that the court has no power to do so. The power of courts in the matter of the rejection of plaints is governed by rule 11 of order VII of the Civil Procedure Code. If it appears that the plaintiff's valuation is fictitious, it can compel him to make it correct and on failure to do so it can reject it. In considering the question of sufficiency or otherwise of the court fee to be paid the court is to confine its attention strictly to the provisions of the Court Fees Act, and there is no need to refer to the provisions of any other Act.

The important question for consideration is whether the two Full Bench rulings in *Kalu Ram v. Babu Lal* (1) and *Sri Krishna Chandra v. Mahabir Prasad* (2) lay down a contrary proposition. In my opinion they do not. I will first take up the Full Bench ruling in *Kalu Ram v. Babu Lal* (1). That was a suit in which there was a clear prayer for the cancellation of an instrument and for the cancellation of a compromise and decree, and therefore section 39 of the Specific Relief Act was clearly applicable. In that case the plaintiff also claimed a substantive relief though clothed in a garb of declaratory

(1) (1932) I.L.R., 54 All., 812.

(2) (1933) I.L.R., 55 All., 791.

decree with a consequential relief. Two points were decided by that Full Bench ruling. One was that where a suit was for cancellation of an instrument under section 39, the relief was not a declaratory one and it fell neither under section 7(iv)(c) nor under schedule II, article 17(iii), but under the residuary article, schedule I, article 1. The other was that the court was entitled to see what was the nature of the relief, and if satisfied that it was not a mere consequential relief but a substantive relief, it could demand the proper court fee on that relief irrespective of the arbitrary valuation put by the plaintiff in the plaint on the ostensible consequential relief. The question as to whether the court could compel a plaintiff to sue for consequential relief when he had deliberately refrained from doing so was not before the Full Bench for consideration. On the other hand, from a perusal of the referring order in that case it would appear that it was one in which the frame of the suit included a prayer for consequential relief. This will appear from the following observation on page 816 where it was remarked: "The appellant has relied upon *Radha Krishna v. Ram Narain* (1). But this ruling does not help him, as in that case the plaintiff sued for a mere declaration that a decree was not binding upon him and he deliberately omitted a prayer for cancellation of the decree. In the present case there is an express prayer for the cancellation of the decree, so the ruling has no application." This being so, I am unable to hold that the Full Bench ruling of *Kalu Ram v. Babu Lal* (2) is an authority for holding that even though the plaintiff deliberately avoids seeking consequential relief he can nevertheless be compelled to add a prayer for a consequential relief so as to make him liable for payment of a higher court fee. It appears to me that while a court has full power to decide whether consequential relief has been sought by the plaintiff, it cannot compel the plaintiff to superadd a prayer for consequential relief when he has

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(1) (1931) I.L.R., 53 All., 552.

(2) (1932) I.L.R., 54 All., 812.

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not in fact asked for such a relief. I might state here that in this Full Bench case there are observations that a relief to have a registered instrument adjudged void or voidable, with the possible result of its being delivered up and cancelled and a copy of the decree being sent to the registration office for a note to be made by the registering officer in his book, is much more than a mere declaratory relief and that it is a substantial relief: See the case of *Sri Krishna Chandra v. Mahabir Prasad* (1). It appears to me, however, that the remarks made on this point in *Kalu Ram's* case (2) are *obiter dicta* and are not binding on us. The reason is very obvious. It is important to bear in mind that the questions which were referred to a Full Bench in *Kalu Ram's* case were only these:

"1. What provisions of the Court Fees Act determine the court fee payable in respect of relief No. 1, i.e. that the mortgage deed in suit may be declared void and ineffectual as against the plaintiffs, and that it may be cancelled?

"2. What provisions of the Court Fees Act determine the court fee payable in respect of relief No. 2, i.e. that the specified compromise and decrees may be cancelled?"

Answers given by the Full Bench to these two questions were as follows:

"1. Relief No. 1 is governed by schedule I, article 1.

"2. Relief No. 2 is one consolidated relief (and not distinct reliefs) and it also falls under schedule I, article 1."

These were the only two points decided by the Full Bench in *Kalu Ram v. Babu Lal* (2). The Full Bench was not called upon to decide the question as to whether a plaintiff who asks for a mere declaratory decree without consequential relief can be compelled to add a prayer for that consequential relief. This will be clear from

(1) (1933) I.L.R., 55 All., 791.

(2) (1932) I.L.R., 54 All., 812.

the observations made by the CHIEF JUSTICE in *Sri Krishna Chandra v. Mahabir Prasad* (1), where it was observed: "Obviously, the Full Bench did not intend to lay down that where the plaintiff deliberately omits to claim a consequential relief and contents himself with claiming a mere declaratory decree, the court can call upon him to pay court fees on the consequential relief which he should have claimed although he has omitted to do so. What was held was that if the plaintiff does not ask for a mere declaratory decree but also asks for a relief which he calls 'consequential' relief, the mere fact that he calls it so would not prevent the court from demanding full court fee, if in reality the additional relief claimed was a substantive relief and not a mere consequential relief. We do not think that the observation was intended to go further than this." It therefore appears to me that the observation in *Kalu Ram v. Babu Lal* (2), that in every case where a relief to have a registered instrument adjudged void or voidable is claimed it amounts to more than a mere declaratory relief, is an *obiter dictum*. The question whether a plaintiff is asking for a mere declaratory decree without consequential relief or is asking for a decree with consequential relief will depend on the allegations made in the plaint in each case and no general rule can be laid down which would cover all cases.

For the reasons given above I would answer the two questions referred to the Full Bench as follows:

Answer to question No. 1:—It is not open to a court to treat the suit as one falling within the purview of section 39 of the Specific Relief Act, if the plaintiff desires it to be construed as one under section 42 of the Specific Relief Act. The plaintiff is at liberty to construe a suit as one under section 42 of the Specific Relief Act. If on a perusal of the plaint the court considers that it is one in which further relief should have been asked for, then it will refuse to grant a declaration.

(1) (1933) I.L.R., 55 All., 791(794). (2) (1932) I.L.R., 54 All., 812.

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Answer to question No. 2:—Where the plaintiff deliberately seeks the relief of declaration and, further, deliberately avoids claiming consequential relief, such as the cancellation of an instrument, the court fee on the plaint and the memorandum of appeal in the lower appellate court should be Rs.10 only in each court under article 17(iii), schedule II of the Court Fees Act and not *ad valorem* court fee on the value of the subject-matter.

BY THE COURT:—The first question referred to this Full Bench is answered in the negative. On the second question, it is declared that the court fee paid in the lower courts was sufficient.

## FULL BENCH

Before Mr. Justice Thom, Mr. Justice Iqbal Ahmad and  
Mr. Justice Rachhpal Singh

SHIAM SUNDAR LAL AND OTHERS (PLAINTIFFS) v. SAVITRI  
KUNWAR (DEFENDANT)\*

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*Civil Procedure Code, order XXXIII, rule 15—Fresh suit after dismissal of application to sue as a pauper—Payment of costs incurred by Government and the opposite party in opposing that application—Condition precedent to institution of suit, if such costs were awarded by the court.*

Where a person has been unsuccessful in an application for permission to sue *in forma pauperis* and the court has awarded costs to the Government and the opposite party in their opposition to the application, and such person subsequently institutes a suit in the ordinary manner, then these costs must be paid prior to the filing of the plaint which commences the suit, and where the costs have not been paid or deposited prior to the institution of the suit the court is bound to dismiss it. But where the court in dismissing the application for permission to sue *in forma pauperis* has either disallowed costs or made no order as to costs, he is entitled to maintain his suit as an ordinary litigant without making any payment to the Government or to the opposite party in respect of the costs incurred in opposing the application.

Dr. N. P. Asthana and Mr. Baleshwari Prasad, for the appellants.

Sir Tej Bahadur Sapru and Drs. K. N. Katju and N. C. Vaish and Mr. Lakshmi Narain Gupta, for the respondent.

THOM, IQBAL AHMAD and RACHHPAL SINGH, JJ.:—  
The question referred to this Bench for decision arises out of plaintiffs' appeal in a suit for redemption. In the trial court the plaintiffs succeeded. In the lower appellate court, however, the decision of the trial court was reversed. The learned Subordinate Judge, whilst finding upon the facts in favour of the plaintiffs, dismissed the suit upon the ground that the plaintiffs had

\*Second Appeal No. 682 of 1933, from a decree of Lakshmi Narain Tandon, District Judge of Shahjahanpur, dated the 10th of March, 1933, reversing a decree of Prem Nath Agha, Additional Subordinate Judge of Shahjahanpur, dated the 31st of January, 1929.



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not complied with the provisions of order XXXIII, rule 15 of the Code of Civil Procedure.

Prior to the institution of the suit the plaintiffs had made an application craving for permission to sue *in forma pauperis*. This application was rejected, but in rejecting the application the court made no order as to costs. The plaintiffs filed the present suit without first paying the costs incurred by the defendants or the Government in opposing the application for permission to sue *in forma pauperis*. The lower appellate court dismissed the suit upon the ground that the payment of the costs incurred by the defendants and the Government in opposing the application to be permitted to sue *in forma pauperis*, prior to the institution of the suit was a condition precedent to the institution of the suit, and a condition with which the plaintiffs had not complied.

The question referred for our decision may be stated as follows: "On a sound construction of order XXXIII, rule 15 of the Code of Civil Procedure is a plaintiff, who has been unsuccessful in an application to be permitted to sue *in forma pauperis* and who has not in fact paid the costs of the Government and the opposite party in their opposition to the application, entitled to maintain his suit as an ordinary litigant?"

Order XXXIII, rule 15 is in the following terms: "An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the Government and by the opposite party in opposing his application for leave to sue as a pauper."

One general question has been submitted for our decision, but in fact two separate and distinct questions are involved, namely what is the effect of order XXXIII, rule 15, (i) where costs have been awarded and (ii)

where there has been no order as to costs or where costs have been disallowed? By the terms of the reference this Bench is invited to decide both these questions.

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Learned counsel for the appellants contended that there has been substantial compliance with the terms of order XXXIII, rule 15, if the costs incurred by the Government or the opposite party in opposing the application to be permitted to sue *in forma pauperis* are paid at any time during the pendency of the suit and before the decision thereof. He urged that the legislature by the provision in question did not intend to limit or restrict the right of a litigant to prosecute his claim in the courts and that it would be contrary to the spirit of the law and of the enactment itself to refuse to entertain a suit merely because prior to its institution the costs of the Government and the opposite party had not been paid or deposited.

It was contended, on the other hand, for the defendants that under order XXXIII, rule 15 the payment of the costs incurred by the Government or the opposite party was a condition precedent to the institution of the suit and that unless the plaintiff had complied with this condition the court was bound to dismiss the suit and was not entitled to give the plaintiffs an opportunity after the institution of the suit of paying the costs of the Government or the opposite party incurred in their opposition to the application to be allowed to sue *in forma pauperis*.

Learned counsel for the appellants in support of his contention relied upon the decision of the Calcutta High Court in the case of *Mrinalini Debi v. Tinkori Debi* (1). The decision clearly supports the plaintiffs' contention. We find ourselves, however, unable to agree with the view of the law approved in that decision.

(1) (1912) 14 Indian Cases, 297.

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Quite clearly the interpretation for which the appellants contend would involve the reading out of the provision under consideration of the word "first". Now it is trite law that every word of a statutory enactment must be given its full meaning and effect. It may be contended that it is unreasonable to insist that the plaintiffs should be denied the opportunity of depositing the costs of the Government or the opposite party after the institution of the suit, but where the words of the statute are clear such considerations cannot justify a refusal to give effect to their plain meaning and intent. We would observe in this connection that order XXXIII, rule 15 is a provision in an enactment regulating procedure. Provisions such as order XXXIII, rule 15 are imperative and not merely directory. We refer in this connection to Maxwell on the Interpretation of Statutes, 6th edition, page 655. The question of the effect of such provisions regulating procedure was considered in a recent case in the Privy Council, *Ohene Moore v. Akesseh Tayee* (1). In that case it was decided that an appeal is a creature of statute and unless the statutory conditions as to the filing of appeals are fulfilled no jurisdiction is given to any court of justice to entertain them. Where the statute provided that an appeal would only lie by leave granted by the trial court and that the said leave was not to be granted unless the costs in the trial court shall have been paid in such court or shall have been deposited therein or in the court to which the appeal was being taken, and the trial court in granting leave by an oversight overlooked this provision of the statute, with the result that the costs of the trial court were not paid in cash either in the trial court or in the appellate court, it was held that the appeal was incompetent and the appellate court had no jurisdiction to entertain it and could not allow the costs to be deposited at a later date.

(1) [1935] A.L.J., 44.

The principle approved in this decision, in our view, clearly covers the question which we have to decide.

Learned counsel for the appellants contended that there was a clear distinction in principle between the provisions of order XXXIII, rule 15 and the provisions which the Privy Council was considering in the case above noted. He urged that in the latter case the statutory provision under consideration was to the effect that "leave to appeal . . . *shall not* be granted unless and until" a certain condition is complied with; whereas order XXXIII, rule 15 merely enjoins that "the applicant shall be at liberty to institute a suit in the ordinary manner. . . provided that he first pays" the costs, etc. It is true that in these *ipsissima verba* order XXXIII, rule 15 does not enjoin that no suit shall be maintainable unless the costs are first paid, but in our judgment this distinction is of no importance. We fail to see any real distinction between a provision denying a litigant a right to sue unless he complies with a certain condition and a provision which grants a litigant a right to sue, provided he first complies with that condition. Order XXXIII, rule 15 is to the effect that the litigant may sue provided he first pays certain costs and in our view this must mean that he will not enjoy the right to sue unless he first pays those costs. No other interpretation in our judgment would do justice to the plain provisions of the enactment.

Learned counsel for the appellants attempted to distinguish the present case from the one referred to above upon another ground. He contended that in the latter case the Privy Council were considering the right of a litigant to appeal and not the right of a litigant to maintain a suit. His argument was that the right to maintain the suit in the courts of justice was not merely a creature of statute but was inherent in the status of citizenship; it was a privilege of every citizen to resort to the courts of law for the vindication of his rights. We are unable to see any real distinction in principle between the right

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to appeal and the right to institute a suit where the question is one of the effect of a statutory restriction. Learned counsel was unable to point to any authority justifying the distinction which he attempted to draw. Furthermore the right to institute a suit is just as much governed by statute as the right to appeal. The right to institute a suit is governed by sections 9 and 80 of the Civil Procedure Code and the right to appeal by section 96. Both rights are regulated in the same statute and we can see no reason for placing the right to institute a suit upon a different plane from the right to prefer an appeal.

We would observe in this connection that order XXXIII, rule 15 is not the only provision which imposes a condition precedent to the institution of a suit. There is statutory provision, for example, that in certain instances two months' notice must first be given by the plaintiff before he may institute a suit against a public authority. This provision imposes a condition precedent to the institution of the suit and it is well settled that the provision must be complied with prior to the institution of the suit and omission to comply with it cannot be rectified subsequent to the institution of the suit.

The question we have discussed was considered by a Bench of this Court in the case of *Mahadeo Sahai v. Secretary of State* (1). In the judgment in that case it was observed that "We have already seen that the plaintiff had attempted to sue *in forma pauperis* but that his application had been dismissed with costs. Before instituting the present suit he had not paid the costs incurred by the Government and by the opposite party in opposing his application for leave to sue as a pauper. The provision of order XXXIII, rule 15 was imperative. The court below was therefore bound to dismiss the suit as being barred by order XXXIII, rule 15." These observations were clearly obiter and unnecessary for the

(1) A.I.R., 1932 All., 312.

decision of the case. We find ourselves in full agreement, however, with the principle enunciated.

In the result we hold that where a plaintiff has been unsuccessful in an application for permission to sue *in forma pauperis* and the court has awarded costs to the Government and the opposite party in their opposition to the application, these costs must be paid prior to the filing of the plaint which commences the suit and that where the costs have not been paid or deposited prior to the institution of a suit a court is bound to dismiss the suit.

We now proceed to consider the question of the effect of order XXXIII, rule 15 where there has been no order as to costs. In such circumstances clearly different considerations arise. Under the provision the costs which the plaintiff has to pay are the "costs (if any) incurred by the Government and the opposite party". It was conceded by learned counsel for the respondents that the words "costs incurred" could not be interpreted and applied in their ordinary literal sense. It was never the intention of the legislature to saddle a plaintiff, who had filed an application to be permitted to sue *in forma pauperis*, with the entire costs which the Government and the opposite party might in every case incur. Where the opposite party or the Government for example incurred costs in opposing the application quite unreasonable in amount and disproportionate to the importance of the occasion, it would be manifestly absurd to insist that before he could institute a suit the plaintiff should pay such sum in the name of costs. In interpreting the words "costs (if any) incurred", therefore, the court must insist upon some limitation. The question we have to decide is what the limitation should be.

Learned counsel for the respondent contended that the costs which the plaintiff must pay before he is permitted to maintain the suit should be the ordinary taxable party and party costs. He argued that this view

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was supported by the general scheme of order XXXIII. In support of this argument he referred to rules 7 and 16 of order XXXIII. Under rule 16 where the applicant has been successful and permission to sue as pauper has been granted, the costs of the applicant shall be costs in the suit. There being no reference to an order of the court fixing the amount of costs in rule 15, learned counsel contended that it must be assumed that the intention of the legislature was that the amount payable by the plaintiff prior to the institution of the suit should be the amount of costs taxable as between party and party. We are unable to accept this contention. The question of the costs is one which is entirely in the discretion of the court under section 35 of the Code of Civil Procedure. It is for the court to say upon a consideration of the entire circumstances whether full costs or modified costs should be awarded. If the contention of learned counsel for the respondents be accepted then the somewhat startling result would follow that where the court deemed it just and expedient to make no order as to costs, that is, not to call upon the plaintiff to pay the cost of Government or the opposite party, by the operation of order XXXIII, rule 15 the plaintiff would be mulcted in the full amount of taxable costs incurred by the Government and the opposite party. Learned counsel for the respondents pointed out that the fee of the Government Pleader in opposing the application to sue *in forma pauperis* was regulated by the rules of court and further that so far as the costs of the opposite party were concerned there is provision regulating the fees chargeable by the legal practitioners. But the fees payable to the Government Pleader or to the legal practitioner are not the only "costs" within the meaning of order XXXIII, rule 15. In opposing an application to sue *in forma pauperis* the Government may incur costs other than the fee of the Government Pleader and would be entitled to recover such costs

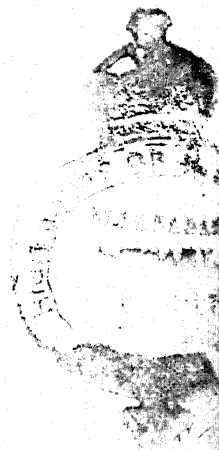
under an order from the court; so also the costs incurred by the opposite party and which he may be entitled to recover are not confined merely to the fee of the vakil or the pleader.

There appears to us to be only one reasonable interpretation which can be placed on the provision regulating the costs payable by a plaintiff who has failed in an application for permission to sue *in forma pauperis*. In our judgment costs incurred must be taken as meaning costs incurred for which the plaintiff is liable. Now the plaintiff cannot be liable for the costs of the Government or the opposite party except by an order of the court. As already observed it is entirely within the discretion of the court to allow or disallow costs and in this connection we would observe that there is no real distinction between the case where the court makes no order as to costs and where the court specifically disallows costs. The successful party in a proceeding in court is not entitled to call upon the unsuccessful party to pay his costs except under the order of the court. If there is no order of the court awarding the successful party his costs against the unsuccessful party or if costs have been expressly disallowed, quite clearly, in no sense, is the unsuccessful party liable for these costs. Section 35 of the Code of Civil Procedure is clear and specific in its terms: "Costs of and incident to all suits shall be in the discretion of the court and the court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid." We can find no justification for holding that the legislature intended by order XXXIII, rule 15 to saddle a litigant with costs which the court refused to award against him in virtue of its powers under section 35.

Our decision is, therefore, that where a litigant has made an unsuccessful application to be permitted to sue *in forma pauperis*, but where the court in dismissing

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the application has either disallowed costs or made no order as to costs he is entitled to maintain his suit as an ordinary litigant without making any payment to the Government or to the opposite party in respect of the costs incurred in opposing the application.

### MISCELLANEOUS CIVIL

*Before Mr. Justice Niamat-ullah and Mr. Justice Bajpai  
And on a reference*

*Before Sir Shah Muhammad Sulaiman, Chief Justice*

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GOPINATH NAIK (APPLICANT) v. COMMISSIONER OF  
INCOME-TAX (OPPOSITE PARTY)\*

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*Income-tax Act (XI of 1922), section 23(3) and (4)—Return of income incorrect and incomplete—Failure of assessee to produce evidence—Assessment, basis of—"Evidence"—Private inquiries not authorised—Assessment of previous year can be relied on—Income-tax Act, sections 13, 31, 37.*

A return of income submitted by an assessee was found to be inaccurate and incomplete. Notice under section 23(2) of the Income-tax Act was issued and accounts called for; certain accounts were submitted which were found to be meagre and unreliable. Fresh notice under section 23(2) was issued, calling upon the assessee to attend and explain certain matters relating to the accounts and to furnish further information, but nothing was done by the assessee. Assessment was then made under section 23(3), the estimate being based *inter alia* on private inquiries made by the Income-tax Officer as to the extent of the assessee's money lending business, and on the assessment for the previous year which was a "best judgment" assessment under section 23(4). On appeal, the Assistant Commissioner of Income-tax made, in his turn, some private inquiries as to the extent of the money lending business, and reduced the assessment:

*Held, (BAJPAI, J., contra), that the Income-tax Officer, or the Assistant Commissioner, was not authorised under section 13 of the Income-tax Act or otherwise to make private inquiries and to take the result of such inquiries into account in making the assessment; and the assessment, in so far as it was based on the private inquiries, was not based on such evidence as*

\*Miscellaneous Case No. 97 of 1933.

the Income-tax Officer or Assistant Commissioner was in law empowered to act upon.

*Held* also, (NIAMAT-ULLAH, J., *contra*), that the assessment for the previous year, even though it was a "best judgment" assessment made under section 23(4), was certainly some evidence on which the Income-tax Officer or Assistant Commissioner was in law entitled to proceed in making the assessment. As the assessee failed to produce satisfactory evidence, he failed to displace the previous year's estimate, which was certainly admissible against him.

There is an essential difference between cases in which action is taken under section 23(3) and those under section 23(4). Where the Income-tax Officer acts under section 23(3) the assessment must be based on "evidence". If the evidence adduced by the assessee is not accepted, or if the assessee does not produce any evidence, the Income-tax Officer must have recourse to other evidence on which to base his assessment; and for this purpose he has ample powers under section 37 to call for evidence. The word used is "evidence", and not some other word like "information". The evidence may not be such as fulfils all the technical requirements as to admissibility, relevancy, etc., of the Evidence Act; but mere conjecture, surmise or assumption of a fact does not amount to evidence within the meaning of section 23(3). *Prima facie* the evidence should be taken in the presence of the assessee or within his knowledge in order that he may be able to meet such evidence. The result of private inquiries made in the absence of and without notice to the assessee is certainly not evidence within the meaning of section 23(3).

On the other hand section 23(4) makes an entirely different provision. Here there is no question of the Income-tax Officer taking any further evidence nor is there any necessity for him to take any evidence at his own instance. No appeal lies in this case, whereas an appeal lies from an assessment under section 23(3); and obviously there ought to be a difference between the two cases as to the availability to the appellate authority of the materials on which the assessment is founded.

[*Per* NIAMAT-ULLAH, J.—Where there is nothing to show that a "best judgment" assessment under section 23(4) was based on any known data, it is no better than a conjecture, surmise or assumption and is not "evidence" within the meaning of section 23(3).]

[*Per* BAJPAI, J.—Sections 37(c), 13, and 31(2) of the Income-tax Act show that proceedings before Income-tax authorities are not judicial proceedings for all purposes; that when the

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method adopted by the assessee has been rejected by the Income-tax Officer, the latter is entitled to adopt a different basis and a different method; and that the power given to the Assistant Commissioner to make such further inquiry as he thinks fit is not fettered by any limitations. It is therefore clear that the Evidence Act with all its details does not apply in the case of an assessment under the Income-tax Act, and a margin of approximation is undoubtedly left to the Income-tax authorities, especially when the assessee has been guilty of contumacy. The private inquiries, therefore, were authorised in this case. According to the principles of natural justice, however, it is not permissible to take the result of such private inquiries into account in making the assessment without giving an opportunity to the assessee to meet them and to displace the Income-tax Officer's estimate. In the present case opportunity after opportunity was given to the assessee.]

Dr. K. N. Katju and Mr. M. N. Kaul, for the applicant.

Mr. K. Verma, for the opposite party.

NIAMAT-ULLAH, J.:—This is a reference under section 66(3) of the Income-tax Act. The assessee is one Pandit Gopinath Naik of Bakhera Bazar, district Basti. He submitted a return under section 22(2) for the assessment year 1929-30. The return was not accepted by the Assistant Commissioner, who was empowered to act as an Income-tax Officer. He was assessed at an income of Rs.1,00,450 including Rs.1,00,000 as his income from money lending business. He appealed to the Commissioner, who set aside the assessment and directed a fresh assessment. The case was subsequently dealt with by the Income-tax Officer, Basti, who issued a notice under section 23(2) directing the assessee to produce his accounts for money lending business. The accounts were produced, and it was discovered that there were serious omissions which created a strong suspicion that the accounts had been manipulated. An opportunity was given to the assessee to explain certain matters. No explanation was, however, furnished. but a fresh return was submitted. The Income-tax Officer called upon

the assessee to substantiate the new return. He also summoned the assessee, who did not, however, appear, nor did he produce any evidence. The Income-tax Officer came to the conclusion that the accounts were "incomplete and unreliable". He estimated the income of the assessee from money lending business to be Rs.1,20,000. The estimate was based on calculating the net profits at the rate of 8 per cent. per annum on Rs.15 lakhs which was taken to have been invested by the assessee in his money lending business. The order of the Income-tax Officer and his reasons in support of it appear from Appendix C.

The assessee appealed to the Assistant Commissioner, who agreed with the Income-tax Officer in rejecting the assessee's account books as unreliable. He, however, estimated the amount invested by the assessee in money lending business to be Rs.11 lakhs only. The Assistant Commissioner based his estimate, partly at any rate, on certain "inquiries", of which there is no record and which were admittedly made behind the back of the assessee, from persons supposed to have an idea of the extent to which the assessee had made investments in his money lending business. His order is Appendix D.

The assessee applied to the Commissioner for revision of the Assistant Commissioner's assessment and for statement of a case being prepared for reference to the High Court. The Commissioner declined to interfere or to make a reference to this Court. The assessee moved this Court under section 66(3), and the Commissioner was required to prepare a case for the determination of the following two questions:

(1) Whether the estimate of 11 lakhs as the capital invested by the assessee is based on such evidence as the Assistant Commissioner was in law empowered to act upon?

(2) Was the Assistant Commissioner authorised under section 13 of the Income-tax Act or otherwise to make

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private inquiries and to take the result of such inquiries into account in making the assessment?

On receipt of this Court's order requiring a statement of the case to be prepared, the Commissioner asked for a report from the Assistant Commissioner as regards the nature of the inquiry made by him and referred to in his order, Appendix D. That report disclosed the fact that the Assistant Commissioner had inquired from the people of Basti about the money lending business of the assessee. They could not point out any big investment. "Rather they stated that his money lending business was much like before". The Assistant Commissioner says that he was led by what the people of Basti had stated to him to conclude that the Income-tax Officer's estimate of the assessee's investment, namely 15 lakhs, was excessive, and so he reduced it to 11 lakhs, because the assessee had been assessed in the year immediately preceding at an income of one lakh based on investments amounting to 10 lakhs in the money lending business. In accepting that exemplar he was influenced by the fact that the assessee had taken no exception to it. The additional sum of one lakh, which brought the total to 11 lakhs estimated by him, was due to the fact that he had discovered certain omissions in the assessee's accounts. One of the questions argued before us was whether the report of the Assistant Commissioner, above referred to, can be accepted as a supplement to his order, Appendix D, by which he had estimated that the assessee had invested 11 lakhs in his money lending business. We think that the report may be accepted as an explanation of certain obscure portions of his order of assessment, which by itself does not clearly show the data on which he proceeded.

The first question raises a point of some nicety and of not a little difficulty. In the present case the Assistant Commissioner based his assessment on the estimated amount of the assessee's investment in money lending

business, assumed to yield a profit of 8 per cent. per annum. The estimate itself is based on the amount of investment assumed in the year immediately preceding and the result of his inquiry at Basti. I use the word "assumed" deliberately, because in that year the assessment was one under section 23(4), that is to say, a best judgment assessment, the assessee not having complied with a notice requiring him to submit a return. For the present year the assessee complied with the notice and furnished a return. Though the Income-tax Officer did not accept the return as correct, he made the assessment not under section 23(4) but under section 23(3).

In my opinion there is an essential difference between cases in which action is taken under section 23(3) and those under section 23(4). I do not pause to consider the question whether the Income-tax Officer could have proceeded under section 23(4) in the present case, as he professed to act under section 23(3). Where a return is furnished, but is considered by the Income-tax Officer to be incorrect or incomplete, he is to serve a notice on the assessee requiring him on a date to be therein specified either to attend the Income-tax Officer's office or to produce, or cause to be produced, any evidence on which the assessee may rely in support of his return. Section 23(3) provides that on the day so specified "the Income-tax Officer *after hearing such evidence as such person may produce and such other evidence as the Income-tax Officer may require*, on specified points, shall, by an order in writing, assess the total income of the assessee, and determine the sum payable by him on the basis of such assessment." The important question which arises in this connection is whether—if the return is found to be incorrect or incomplete and the assessee produces no evidence—it is open to the Income-tax Officer to assess the income in any manner he thinks fit, or whether the assessment must proceed on some

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"evidence". It is argued by the learned advocate for the Income-tax Department that there is nothing in section 23(3) which makes it incumbent on the Income-tax Officer to base his assessment on "evidence", whatever it may mean. It is pointed out that section 23(3), as it stands, merely makes it obligatory that the evidence which the assessee may produce or the Income-tax Officer may call for should be heard, but that if no such evidence is produced by the assessee nor is any called for by the Income-tax Officer himself, it is open to him to make the assessment on such basis as he thinks fit. If this line of argument is accepted, an assessment made under section 23(3) will in many cases be virtually an assessment under section 23(4), i.e., best judgment assessment which may be based on a pure conjecture. This kind of assessment is, however, allowed only in cases falling within the purview of section 23(4), i.e., where the assessee fails to make a return or fails to produce his accounts when required to do so, or fails to comply with all the terms of the notice under section 22(4). In the present case these conditions were *ex hypothesi* absent, and the Income-tax Officer did not proceed under section 23(4). It follows that a case for assessment to the best of judgment of the Income-tax Officer did not exist. It seems to me that where the Income-tax Officer acts under section 23(3), the assessment must be based on "evidence". The obligation to hear evidence which may be produced by the assessee or may be called for by the Income-tax Officer himself is a clear index to the further obligation to "determine" the sum payable by the assessee on the basis of the evidence adduced in the case. Where the assessee himself does not produce any evidence, the Income-tax Officer cannot be at a loss to make the assessment, because the law has given him ample powers to call for evidence. Section 37 of the Act empowers him to enforce the attendance of any person and to examine him on oath

or affirmation, compel the production of documents and to issue commission for the examination of witnesses. Where the assessee himself does not produce any evidence, comparatively slight evidence, coupled with the inference drawn from the conduct of the assessee, will be enough for compliance with the requirements of section 23(3).

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“The next question is as to what is meant by the word “evidence” used in section 23(3). It is not defined in the Income-tax Act itself. So far as I have been able to ascertain, no rules have been made under section 29 laying down what should be considered to be evidence for the purpose of assessment. I think that, on the one hand, the legislature did not intend that the evidence on which the Income-tax authorities are to act should be evidence which fulfils all the technical requirements of the Indian Evidence Act; on the other hand mere conjecture, surmise or assumption of a fact, as distinguished from inference from proved circumstances, does not amount to evidence within the meaning of section 23(3). Where the Income-tax Officer based his assessment on the statements of witnesses, they should be produced before him “on the day specified in the notice issued under sub-section (2)”, i.e., the day on which the assessee is to attend and to produce his evidence, which implies that the evidence should be “produced” in his presence. Whether the evidence should be in every case on oath and be in accordance with the rules of relevancy laid down in the Indian Evidence Act are questions which do not call for decision in the present case. It is enough to say, for the purpose of this case, that the result of the inquiries made by the Assistant Commissioner from certain residents of Basti in the absence of the assessee is not evidence within the meaning of section 23(3). The only other ground on which the Assistant Commissioner based his assessment is that, in the year immediately preceding, the assessee’s investment had been found to be 10 lakhs. As already

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mentioned, in that year the assessment was under section 23(4), i.e., best judgment assessment, which need not have been based on evidence. There is no appeal allowed from such assessment, which may be based on no data or may be arbitrary. If a mere conjecture, surmise or assumption, however shrewd, is not "evidence" within the meaning of section 23(3), as I hold, then such conjecture, surmise or assumption, made in the previous year under section 23(4), can be no more evidence. There is nothing to show that the assessment for the last year, which was a "best judgment" assessment, was based on any known data. It was a conjecture or assumption, which the Income-tax Officer was entitled to make in view of the assessee's conduct. The assessee's conduct this year, though open to objection otherwise, is admittedly not such as to justify assessment of that kind. The Income-tax Officer should have based it on "evidence" as required by section 23(3). It was open to the Income-tax Officer to have relied on the records of several past years which were in his possession. It is not disputed that the assessee was assessed for several years in the ordinary course, and not under section 23(4); and if the Income-tax Officer had taken those assessments as a guide, it could not have been said that his assessment for the year in question was based on no evidence.

The Commissioner contends in his remarks made in the statement of the case: "The Assistant Commissioner's estimate of the investment is, however, based not on the result of those inquiries but on other data. These data were furnished by the assessment for the year 1928-29, the year immediately preceding the assessment year in dispute, in which the total investment was estimated by the Income-tax Officer of the time at 10 lakhs and the estimate was accepted by the assessee without a demur and without having recourse to the remedy provided by section 27 against a best judgment assessment under section 23(4)." A "best judgment" assess-

ment remains what it is, even though the assessee may not "demur" or may have no "recourse to the remedy provided by section 27". Moreover, all that the assessee could have done under section 27 was to offer to satisfy the Income-tax Officer "that he was prevented by sufficient cause from making the return required by section 22, or that he did not receive the notice issued under section 22(4) or section 23(2), or that he had not a reasonable opportunity to comply, or was prevented by sufficient cause from complying, with the terms of the last mentioned notices. . . ." His failure to satisfy the Income-tax Officer on any of the matters referred to in that section can throw no light on the arbitrary character or otherwise of the best judgment assessment. It should be noticed that an application under section 27 is not aimed at the merits of the assessment, but has reference to wholly collateral matters.

The Commissioner further observed: "The estimate itself is, in the Commissioner's opinion, founded on adequate grounds which have not been rebutted by any evidence produced by the assessee. In using this language to convey his reply to the first question, the Commissioner desires, very respectfully, to point out that the wording of the question is such that it might be read as implying that a greater burden of proof is thrown upon the Income-tax authorities than the law itself prescribes; the scheme of the Act, as will be clearly seen from the wording of sub-section (2) of section 23, is that if the Income-tax Officer has *bona fide* grounds for holding a certain belief, he must give the assessee an opportunity of producing evidence to rebut that belief; but subject to such evidence, the burden of producing which is on the assessee, it is not necessary that the materials on which the Income-tax authority bases his belief should have the formality of judicial evidence." I am unable to concur with the Commissioner in the view he takes of the scheme of the Act. It is true that section 23(2) provides that where the Income-tax Officer

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has reason to believe that a return is incorrect or incomplete he may call upon the assessee to substantiate it and that, to that extent, the onus lies on the assessee. It could not be otherwise. The assessee alleges by his return that his assessable income is what is stated therein. But the Income-tax Officer denies that fact. The onus is undoubtedly on the assessee, if he maintains that his return is correct; but if the return is set aside and the Income-tax Officer puts forward an affirmative case that the assessee's income is more and gives a definite figure, the onus is on him to support his case. It cannot be said that the onus lies on the assessee not only to substantiate his return but also to disprove every allegation or assertion which the Income-tax Officer may choose to make. This is clear from section 23(3) which makes it incumbent on the Income-tax Officer to make the assessment "after hearing such evidence as such person may produce and such other evidence as the Income-tax Officer may require, on specified points". That part of the section obviously means that the Income-tax Officer shall hear the evidence which the assessee may produce in support of his return, and that if the return or the evidence in support thereof is not accepted, the Income-tax Officer shall hear such further evidence as may be necessary for making the assessment. The words "may require" refer to his requirements in making the assessment and not to evidence which he may call for. It is clear to my mind that the section contemplates that if the evidence adduced by the assessee is not accepted, the Income-tax Officer must have recourse to other evidence to base his assessment on. It does not place the Income-tax Officer absolutely on the defensive, so that, if the assessee's attempt to substantiate his return fails, the Income-tax Officer can assume the income of the assessee to be anything which his imagination may lead to.

Reliance was placed by the learned advocate for the Commissioner on the following observation occurring

in the case of *Commissioner of Income-tax v. Maharaja-dhiraj of Darbhanga* (1): "In the High Court the CHIEF JUSTICE (COURTNEY TERRELL) after pointing out that the question is one of quantum only says: 'Learned counsel for the assessee has argued that the officer is not entitled to make a guess without evidence, and I agree with that contention, but in this case the state of affairs in the previous years, coupled with the fact that the assessee had a large mortgage loan business and must have enforced mortgages by sale on many occasions, afford ample material for the assessment made. I would answer the question in the affirmative.' The other Judges concurred, and their Lordships also agree, adding only that if the assessee wished to displace the Taxing Officer's estimate, it was open to him to adduce evidence of all his purchase transactions during the year and of the financial results thereof, which he apparently made no attempt to do."

It is argued that their Lordships have laid down the rule that the Income-tax Officer is to make an estimate, and the onus is thrown on the assessee to disprove that estimate. The observation must be considered in the light of the facts of that case, which was one in which the assessee's return was out of the question. The Income-tax Officer had made an estimate, which was based on evidence. The CHIEF JUSTICE clearly pointed out that the estimate was based on evidence, as it should have been. He clearly says that the Income-tax Officer is not entitled to make a guess without evidence; but he found that the guess, (which amounts to estimate if there is evidence in support of it), was, in that case, borne out by the evidence, and the only question was one of quantum. Their Lordships approved of this view and held that the assessee should have adduced evidence to rebut the estimate. It seems to me that the case was one in which the initial onus resting on the

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Income-tax Officer (the return being ignored) was discharged, and a case existed for the assessee to rebut the estimate made by the Income-tax Officer. I think that the case quoted above does not support the contention put forward on behalf of the department.

In the present case, if instead of 15 or 11 lakhs, the Income-tax Officer or the Assistant Commissioner had taken the assessee's income to be 50 lakhs he would have had no means of rebutting that assumption. In my opinion, to countenance the rule contended for by the Commissioner will lead to highly undesirable results.

For the reasons explained above, I answer the first question in the negative. The answer to the second question will, in a great measure, follow from that to the first. Section 13 merely provides for methods of accounting. It throws no light on the main question in the case as to whether the result of private inquiries made by the Assistant Commissioner is or is not evidence for the purpose of section 23(3). I answer the second question also in the negative.

BAJPAI, J.:—In this case under section 66(3) of the Indian Income-tax Act the High Court, after the refusal of the Commissioner to state a case on the assessee's application, required the Commissioner to state a case and to refer it, by an order dated the 27th of October, 1933. The Commissioner was directed to prepare a case for the determination of the following questions of law:

1. Whether the estimate of 11 lakhs as the capital invested by the assessee is based on such evidence as the Assistant Commissioner was in law empowered to act upon.

2. Was the Assistant Commissioner authorised under section 13 of the Income-tax Act or otherwise to make private inquiries and to take the result of such inquiries into account in making the assessment?

It is necessary to state the facts in some detail. For the assessment year 1929-30 the Assistant Commissioner

of Income-tax of Benares, who had been empowered under section 5(4) of the Income-tax Act to deal with the case as an Income-tax Officer, after rejecting the accounts produced by the assessee, assessed the amount of his income at Rs.1,00,450 by his order dated the 6th of March, 1930. The Commissioner on appeal by his order dated the 1st of August, 1930, set aside the assessment and directed that a fresh assessment be made and the Income-tax Officer was required specifically to deal with the following points:

1. Whether the accounts can be computed as complete or whether they should be rejected as incomplete?

2. In case the accounts are rejected as incomplete what should be estimated as the assessee's income from money lending? (It may be mentioned that the Assistant Commissioner had estimated the income from money lending as one lakh.)

By this time the Income-tax Officer of Basti was a full powered officer and it was not necessary for the Assistant Commissioner to deal with the matter.

A fresh notice was issued under section 23(2) and in compliance with that notice the assessee produced certain accounts for the money lending business. In the Income-tax Officer's opinion there were several omissions in the books and they were pointed out to the assessee's representative who admitted the mistakes and requested for an adjournment in order to enable him to explain the omissions. The case was postponed to the 17th of March, 1931, and at the same time the Income-tax Officer under section 23(3) asked for evidence on specified points. No evidence was produced on this date nor was any explanation offered, but a fresh return was received through the post. On receipt of this return the Income-tax Officer issued a fresh notice on the 20th of April, 1931, under section 23(2) requiring the assessee to produce evidence in support of the revised return, and at the same time he issued

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a summons under section 37 of the Income-tax Act for the personal attendance of the assessee. The date fixed for this purpose was the 30th of April, 1931. On the 2nd of May, 1931, the assessee sent a letter that he had no evidence to produce beyond the account books which had already been produced before the Income-tax Officer, and as regards his personal attendance he requested that the case might be postponed to some date in June. The Income-tax Officer could not postpone the case to June but fixed the 13th of May, 1931, for hearing. The assessee once again sent a petition by post repeating that he could not produce any other evidence except the accounts which were already in the possession of the Income-tax Officer. The Income-tax Officer then on the same date wrote a letter to the assessee warning him that if the summons under section 37 and the notice under section 23(2) were not complied with by the 18th of May, 1931, he would be compelled to hold adversely to the assessee that the revised return was not a return under section 22(3) and that the income stated therein was not based on the accounts produced. There was no compliance, but an application was received on the 1st of June, 1931, by which the assessee asked for an adjournment to some date after the 8th of June. The Income-tax Officer allowed one more opportunity and postponed the case to the 8th of June. The assessee failed to attend or produce evidence.

The Income-tax Officer then on that date proceeded to assess the income of the assessee. He in his judgment pointed out various omissions, falsehoods and concealments and observed: "Taking all these facts into consideration it is difficult for me to accept the books produced by the assessee. No income can be deduced from them. I feel convinced that they are incomplete and fictitious." He then turned his attention towards the computation of the income of the assessee. He said: "The total investment of the assessee

according to the books produced before me comes to about five lakhs only. But my predecessor in the year 1928-29 estimated a total investment of 10 lakhs. The assessee himself never disclosed his entire investment and in the year Samvat 1984, for which 10 lakhs were estimated, he showed a total investment of Rs.2,70,231 only. This figure can give some idea of the extent to which, as a matter of habit, he is prone to conceal. When, however, my predecessor made the estimate of 10 lakhs on the material available to him he was not aware of the investments to the extent of about two lakhs, which have now been incorporated in the books of Samvat 1985 through the personal account of Pandit Gopinath. At least there is nothing on the record to show that he was aware. Over and above these, as is shown in the course of this order, the assessee has at least concealed an investment of Rs.11,735 on which Rs.704 were credited as interest, against Tribeni Chippi. The record of the assessee is not very clean. There has not been any single assessment in any year which has been made on the basis of his books. Penalty under section 28, too, was imposed in one year. Concealments are discovered every year, and the books have to be rejected. In fact in the year 1928-29 after some concealments were discovered, he promised to my predecessor, as is apparent from his order, that he would in future produce the correct books. He has not fulfilled this promise. This year I have made detailed inquiries at Bakhera and the neighbouring places and also at Gorakhpur, the district in which the assessee has considerable investment. I am told that advances are made in the villages in the districts of Gorakhpur and Basti and they are never shown in the books produced before us. His total investment is, in my opinion, of about 15 lakhs. The rate of interest charged by the assessee of course varies with the particular investment. It sometimes is in the neighbourhood of 24 per cent. But at the same time there are loans, I am told, in which the rate of interest is

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so low as 6 per cent. I, therefore, think it to be fair if I take an income of Rs.1,20,000 from money lending."

It would thus appear that the estimate made by the Income-tax Officer was based on the fact that the estimate of the previous year by the former officer was 10 lakhs, that the previous order did not show that the officer was aware of investments to the extent of about two lakhs, that some further concealments had been discovered, that the record of the assessee was not clean, that the promise to produce the correct books was not redeemed, and that the assessee had the reputation of a big money lender. This reputation was based as far as one can gather on private inquiries.

There was an appeal and the Assistant Commissioner went into the matter in detail and he also came to the conclusion that "In view of the omissions and irregularities discussed above, it is clear that the books of Samvat 1985 are not complete and do not reflect the entire income of the appellant. Therefore, the Income-tax Officer was justified in rejecting them and not basing his assessment on them." He then proceeded to consider whether the estimate of an income of Rs.1,20,000 made by the Income-tax Officer from money lending business was a fair one. He said: "The Income-tax Officer has estimated the total investment of the appellant at about 15 lakhs against 10 lakhs estimated previously. The partial account books of the appellant show his investments at a little under six lakhs, and the amounts of concealment discovered do not warrant the estimate of investments at such a high figure as 15 lakhs. I have also made inquiries and *taking all the circumstances of the case* into consideration, it would be fair to estimate his investments at 11 lakhs." The income from this capital at the average rate of 8 per cent. which appeared to the Assistant Commissioner a fair one was fixed at Rs.88,000 against Rs.1,20,000 determined by the Income-tax Officer.

The assessee then requested the Commissioner to state a case to the High Court under section 66(2); the Commissioner of Income-tax by his order dated the 24th of August, 1932, refused to state a case, but on the assessee's application the High Court required the Commissioner to refer a case and this, as mentioned before, has been done now. The Commissioner asked the Assistant Commissioner to report on the question as to how the estimate at 11 lakhs as the capital invested by the assessee was made and in his report, dated the 20th of December, 1933, he says: "The assessee was assessed on 30th March, 1929, for the year 1928-29 on Rs.1,00,300 including an income of one lakh from business on estimated investments of about 10 lakhs. No exception was taken to this assessment by the assessee. A loan of Rs.11,018-15-6 together with Rs.716-9-3 on account of interest or Rs.11,735 in round figure due from one Tribeni Ram Chhipi of Gorakhpur was found missing from the books of the assessee. Some omissions and discrepancies were also found out as discussed by me in my appellate order of 29th of February, 1932. On account of these omissions I added one lakh to the investments of 10 lakhs as were estimated before, which was a good evidence. Thus I determined his total investments at 11 lakhs."

The learned Commissioner is of the opinion that an estimate of 11 lakhs as the capital invested by the assessee is based on such evidence as the Assistant Commissioner was in law empowered to act upon. It has been argued before us by the assessee that there was no basis in law for the estimate made by the Assistant Commissioner.

Various considerations arise in connection with the first question formulated by us. Under section 3 of the Indian Evidence Act a "court" includes all persons, except arbitrators, legally authorised to take evidence, and, in view of section 37 of the Income-tax Act, Income-tax Officers, Assistant Commissioners and Commissioners may be said to be a "court". But the Evidence Act applies only to "judicial proceedings", and under section

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37 a proceeding before an Income-tax Officer, Assistant Commissioner or Commissioner shall be deemed to be a "judicial proceeding" within the meaning of sections 193 and 228 and for the purposes of section 196 of the Indian Penal Code. It will, therefore, appear that the proceedings before the various Revenue Officers mentioned above are "judicial proceedings" to a limited extent only and they are "courts" under the Civil Procedure Code to a limited extent only, namely to the extent indicated by section 37. If an Income-tax Officer in making an investigation was a court and if proceedings before him were judicial proceedings for all purposes, then there was no necessity for enacting section 37. It is reasonable to hold that, on the principle of *expressio unius est exclusio alterius*, such proceedings are not judicial proceedings for other purposes, and there can be little doubt that the detailed provisions of the Indian Evidence Act will not apply to such proceedings, and this is obvious because the same person cannot be a party, Judge and witness in his own case. This is made further clear from the fact that under section 23(4) the Income-tax Officer has perforce to assess to the best of his judgment, and in that case, although the Income-tax Officer is not entitled to make an assessment capriciously and arbitrarily but by honest means and in honest spirit, yet at the same time he cannot adopt lawyer-like methods and follow the strict provisions of the Indian Evidence Act.

Under section 13 of the Indian Income-tax Act, if no method of accounting has been regularly employed or if the method employed is such that in the opinion of the Income-tax Officer the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine. This provision also shows that when the method adopted by the assessee has been rejected by the Income-tax Officer then he is entitled to adopt a different basis and a different method. Under section 31(2) the Assistant Commissioner may, before dis-

posing of any appeal, make such further inquiry as he thinks fit or cause further inquiry to be made by the Income-tax Officer. The scope of such an inquiry is not fettered by any limitations. It is, therefore, clear to my mind that the Indian Evidence Act with all its details does not apply in the case of an assessment under the Indian Income-tax Act, and a margin of approximation is undoubtedly left to the Income-tax authorities, specially when the assessee has been guilty of contumacy. In *Commissioner of Income-tax v. Maharajadhiraj of Darbhanga* (1) their Lordships of the Privy Council quoted the following passage from the judgment of the learned CHIEF JUSTICE of Patna: "Learned counsel for the assessee has argued that the officer is not entitled to make a guess without evidence, and I agree with that contention, but in this case the state of affairs in the previous years, coupled with the fact that the assessee had a large mortgage loan business and must have enforced mortgages by sale on many occasions, afford ample material for the assessment made. I would answer the question in the affirmative." And then their Lordships proceed and say that with this observation of the CHIEF JUSTICE "the other Judges concurred, and their Lordships also agree, adding only that if the assessee wished to displace the Taxing Officer's estimate, it was open to him to adduce evidence of all his purchase transactions during the year and of the financial results thereof, which he apparently made no attempt to do." Under circumstances like these the Income-tax Officer has to proceed upon the principles of natural justice. In the present case the Assistant Commissioner, when disposing of the appeal by his order dated the 29th of February, 1932, had before him the order of the Income-tax Officer which had stated the circumstances of the case and from which I have quoted *in extenso* in an earlier portion of my judgment. He based his estimate on the fact that the partial account books of the appellants showed his investment

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(1) (1933) I.L.R., 12 Pat., 318.

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at a little under six lakhs. He also took into consideration the fact that there were certain concealments, that no assessment in any previous year had been made on the basis of his books, that he had not fulfilled the promise of producing correct books and the fact that the assessment of the previous year upon a money lending business of 10 lakhs had not been challenged in any manner available to the assessee. He also paid due regard to the fact that the *ex parte* detailed inquiries made by the Income-tax Officer showed that advances made in the districts of Gorakhpur and Basti were never shown in the books. He then came to the conclusion that taking all the circumstances of the case into consideration it would be fair to estimate his investments at 11 lakhs.

He makes the basis of his estimate further clear by his report dated the 20th of December, 1933, which has been quoted in an earlier part of my judgment. I have no reason to doubt his statement contained in this report and I see no reason to accept the contention of the counsel for the assessee that the Assistant Commissioner of Income-tax, when he says that he took into consideration the fact of the previous year's assessment, took his cue from the argument of the Crown counsel advanced before us when the question of asking the Commissioner to state a case was under consideration. His original appellate order clearly shows that he took all the circumstances of the case into consideration and he now definitely states that he took this factor into account. I am, therefore, of the opinion that in the peculiar circumstances of the case the estimate of 11 lakhs as the capital invested by the assessee is based on such evidence as the Assistant Commissioner was in law empowered to act upon, and my answer to the first question is in the affirmative.

As regards the second question I have already said, when discussing the first question, that the Revenue Officers have a large discretion to make private inquiries and from the very nature of the proceedings it is apparent that such inquiries are essential. It is, however, neces-

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sary that the principles of natural justice should not be violated and the assessee should be permitted to meet the case as revealed by the inquiries. In the present case opportunity after opportunity was given to the assessee and he was asked to produce his books and to attend in person. His representative on one occasion admitted that omissions had been made and asked for time to explain them. No explanation was ever offered and the Assistant Commissioner in his report dated the 20th of December, 1933, says that he used the result of his inquiry in favour of the assessee by reducing the estimate of the Income-tax Officer. My answer to the second question, therefore, is that the Assistant Commissioner was authorised under section 13 of the Income-tax Act and also otherwise to make private inquiries, but he is not permitted to take the result of such private inquiries into account in making the assessment, without giving an opportunity to the assessee to meet them and (in the words of their Lordships of the Privy Council) "to displace the Taxing Officer's estimate".

There being a difference of opinion between the two Judges composing the Bench, the case was referred to a third Judge, who delivered the following judgment:

SULAIMAN, C.J.:—This case has been referred to a third Judge because of a difference of opinion between the two learned Judges who heard this reference under section 66 of the Income-tax Act.

The two questions for consideration are as follows:

(1) Whether the estimate of 11 lakhs as the capital invested by the assessee is based on such evidence as the Assistant Commissioner was in law empowered to act upon?

(2) Was the Assistant Commissioner authorised under section 13 of the Income-tax Act or otherwise to make private inquiries and to take the result of such inquiries into account in making the assessment?

It appears that for the year 1928-29 (corresponding to 1984 Sambat) the assessee was assessed on the basis of a

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capital investment in money lending business amounting to 10 lakhs. This assessment was based on the best judgment estimate made in the absence of any evidence produced by the assessee.

For the year 1929-30, which is the year in dispute in this case, the assessee submitted a return for Rs.29,810 which was considerably below the estimated income of the previous year. The Assistant Commissioner considered the return to be incorrect and incomplete and issued notice under section 23(2) to the assessee to attend at the office or produce any evidence on which he might rely in support of the return. The assessee appeared and produced certain account books after information was called for by the Assistant Commissioner under a fresh notice issued under the sub-section. Afterwards on the 6th of March, 1930, the Assistant Commissioner, the Income-tax Officer not being empowered at that time, made the assessment on an income of one lakh from money lending business. On appeal the Commissioner of Income-tax set aside the assessment and sent the case back with certain directions. A fresh notice was accordingly issued by the Income-tax Officer, who then became invested with the necessary powers, under section 23(2) and the statement of the assessee was recorded. The account books produced by him were again examined and then a fresh notice under section 23(3) was issued to him on the 16th of March, 1931. The assessee submitted a revised return, but the Income-tax Officer was still not satisfied and issued a fresh notice under sub-section (2) for further information as well as for personal attendance. There were some adjournments of the hearing, when another notice under sub-section (3) was issued on the 19th of May, 1931, for further particulars on specific points. Ultimately on the 8th of June, 1931, the Income-tax Officer made an assessment on the basis of a capital investment of 15 lakhs, and calculating the income at the rate of 8 per cent. per annum fixed Rs.1,20,000 as the income from

the money lending business. The learned Income-tax Officer found fault with the account books produced by the assessee and considered them incomplete and unreliable and did not act upon them. In the course of his order he remarked: "This year I have made detailed inquiries at Bakhera and the neighbouring places and also at Gorakhpur, the district in which the assessee has considerable investment. I am told that advances are made in the villages in the districts of Gorakhpur and Basti and they are never shown in the books produced before us. His total investment is, in my opinion, of about 15 lakhs." When the matter went up in appeal before the Assistant Commissioner, no ground seems to have been taken against the Income-tax Officer making private inquiries, but a ground was taken that the estimate based on rumour or private information in a vague and fanciful way was *ultra vires*. There were several hearings before the Assistant Commissioner. He also seems to have acted under section 31 of the Income-tax Act in making further inquiries and taking some evidence. Statements of the assessee and at least of one witness were recorded and certain books were also examined. The appeal was ultimately disposed of on the 29th of February, 1932, by an order under which the capital investment was reduced from 15 lakhs to 11 lakhs, but the average rate of 8 per cent. was maintained. In view of the omissions and irregularities pointed out by him, it was clear that the account books of the assessee were not complete and did not reflect the entire income of the appellant, and accordingly the Income-tax Officer was justified in rejecting them and not basing his estimate on them. In proceeding to consider whether the estimate of the income of Rs.1,20,000, made by the Income-tax Officer, from money lending was a fair one, the learned Assistant Commissioner remarked: "The Income-tax Officer has estimated the total investment of the appellant at about 15 lakhs against 10 lakhs estimated

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previously. The partial account books of the appellant show his investments at a little under six lakhs, and the amounts of concealment discovered do not warrant the estimate of investments at such a high figure as 15 lakhs. I have also made inquiries and taking all the circumstances of the case into consideration, it would be fair to estimate his investments at 11 lakhs. It is now ascertained that the bulk of his loans carry interest from 6 per cent. to 9 per cent. per annum and only small loans bear 24 per cent. per annum."

On an application made by the assessee the Commissioner declined to state the case for the High Court, but on a further application made to the High Court a Bench of this Court by their order dated the 27th of October, 1933, asked the Commissioner to state the case on the two points quoted at the outset. In compliance with this order the case has been stated by the Commissioner. The Bench in the course of their order had directed that in preparing the statement of the case it should be clearly shown whether any, and if so, what inquiries were made by the Assistant Commissioner behind the back of the assessee, as his reference to inquiries was somewhat vague and in the context in which it occurred it gave the impression that he made inquiries behind the back of the assessee.

The first question which has been argued before me is whether it would be proper to take into account the subsequent explanation furnished by the Assistant Commissioner as directed by this Court. The Assistant Commissioner in his explanation has said: "I inquired from the people of Basti about the money lending business of the assessee. They could not point out to me any big investments, rather they stated that his money lending business was much like before. This led me to conclude that the Income-tax Officer's estimate of the assessee's investments of 15 lakhs was excessive, despite the fact that he gave reasons for estimating them at 15 lakhs." He then proceeded to give reasons why he kept

the investments at 11 lakhs, emphasising his reliance on the previous estimated investment of 10 lakhs and additions made thereon on account of certain discrepancies in the books.

I do not think that it would be appropriate to take into account the explanation of the Assistant Commissioner detailing the reasons on which he proceeded in order to make the assessment at 11 lakhs. His explanation of the nature of the inquiry made by him was, of course, in response to the suggestion made by this Court. The propriety or otherwise of the order of assessment made by the Assistant Commissioner must depend on the order as it stands, irrespective of additional reasons that have been given by him subsequently.

No question arises before me as to whether the assessment of income-tax on the basis of interest accrued on investments, even though not realised, because it was stated that the accounts were kept on a mercantile accountancy basis, was correct. I, therefore, express no opinion on this point.

The principal question for decision is whether the private inquiries made by the Income-tax Officer and the Assistant Commissioner were proper and the result of such inquiries could be taken into consideration by them in making the assessment. It seems to me that under section 23 when a return is received by an Income-tax Officer, he is not bound to accept it as correct and complete. He is entitled to make inquiries as to whether there is reason to suspect that the return is incorrect or incomplete. He can also look into the previous assessments and consider whether there is any serious ground for suspicion. All such acts done by him are in the nature of administrative acts and in my opinion no objection can be taken to such private inquiries which must, of a necessity, be carried on behind the back of the assessee and even before he has any notice that such inquiries are being made.

If the Income-tax Officer is satisfied that the return is correct and complete, he has to proceed under sub-

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section (1) of section 23. He has to assess the income of the assessee on the basis of the return. If, however, he has reason to believe that the return is incorrect and incomplete, he has to serve notice under sub-section (2) of that section on the assessee specifying a date and calling upon him to attend at his office or produce any evidence on which he may rely in support of his return. From this stage the proceeding assumes the character of a judicial inquiry, although not conducted by a judicial officer. The Income-tax Officer has to make up his mind as to whether the return is incorrect and should be relinquished and, if so, what should be the proper assessment.

Under sub-section (3) of this section the Income-tax Officer has to hear such "evidence" as the assessee may produce and "such other evidence as the Income-tax Officer may require" on specific points; and he has then to assess the income and determine the sum payable by the assessee on such basis. Now section 37 of the Act empowers the Income-tax Officer to enforce the attendance of persons and examine them on oath or affirmation, compel the production of documents and issue commissions for the examination of witnesses. All these are matters which have necessarily to be resorted to in the presence of and within the knowledge of the assessee. Sub-section (3) of section 23 speaks of the Income-tax Officer hearing such other evidence as he may require, that is to say, evidence other than that produced by the assessee which the Income-tax Officer considers necessary to take, but the word used is "evidence" and not other words, like, information. It would seem to follow *prima facie* that what the sub-section authorises the Income-tax Officer to do is to take evidence in rebuttal of the evidence produced by the assessee and which *prima facie* should be taken in the presence of the assessee and of which the assessee should have knowledge in order that he may be able to meet such evidence.

On the other hand, sub-section (4) of section 23 makes an entirely different provision. Where the assessee fails to make a return or fails to comply with all the terms of the notices issued to him, the Income-tax Officer "shall make the assessment to the best of his judgment". Here there is no question of his taking any further evidence nor is there any necessity for him to take any evidence at his own instance. The penalty prescribed for failing to make the return or for failing to comply with the terms of a notice is that the matter is left to the final discretion of the Income-tax Officer to make the best of the assessment he can and his order is final and no appeal lies therefrom.

Obviously there ought to be a difference between a case where a further appeal is allowed and a case where no such appeal lies. Where an appeal lies to a higher court, it would be inappropriate that the Income-tax Officer's assessment should be based on the result of private inquiries made by him behind the back of the assessee, of which no record is kept, for such materials would not be before the appellate court which has to exercise its own judgment in seeing whether the assessment is correct or not correct. On the other hand, where the Income-tax Officer's order is to be final, there is no such necessity, though there is a remedy by way of getting this order set aside if sufficient cause is shown.

Now the provisions of section 23 apply to the Income-tax Officer just as much as they would apply to the Assistant Commissioner in hearing an appeal. It would, therefore, follow that even though the order of the Assistant Commissioner is final on facts, he also would not be competent to make private inquiries behind the back of the assessee and collect information which the assessee has no opportunity to meet. It, therefore, seems to me that the inquiries made by the Income-tax Officer from the people of the district, after proceedings under section 23(3) had started, of which no notice had been given to the assessee, were illegal and not authorised by

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sub-section (3). Similarly the inquiries made by the Assistant Commissioner during the hearing of the appeal behind the back of the appellant were not justified by the provisions of sub-section (3) and the result of such private inquiries should not have been made the basis of any assessment.

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On the other hand, I see no objection in the Income-tax Officer or the Assistant Commissioner acting upon the assessment for the previous year if no better evidence is forthcoming. An Income-tax Officer, and for the matter of that, an Assistant Commissioner is not bound to accept either the correctness of the return or the genuineness and completeness of the account books produced before him or the truth of the evidence produced by the assessee. If he has ground for believing that such evidence is untrustworthy, he can certainly reject it. Having rejected such evidence it is open to him to pursue the inquiry further and take more evidence which he considers necessary; but he is not bound to do so. In the absence of any better evidence he is certainly entitled to fall back on the assessment of income made during the previous year, even though that assessment might have been the best judgment estimate. The fact that during the previous year the income was assessed on a certain figure is certainly some evidence on which he can proceed, even independently of any assumption of continuity. If the assessee fails to produce satisfactory evidence, he fails to displace the previous year's estimate, which is certainly admissible against him.

In this view of the matter I am of the opinion that the finding of the Assistant Commissioner was passed partly on the result of private inquiries made by him and partly on the admitted circumstances of this case. So far as it was based on the private inquiries, it was improper and is vitiated. But if it could be based on the other circumstances, without taking into account the result of the private inquiries, then the finding would not be illegal according to the principle underlying section 167

of the Indian Evidence Act. I am not called upon to say whether in this particular case the assessment at 11 lakhs could have been made on the other circumstances of this case excluding the result of the private inquiries. This is for the Assistant Commissioner to decide.

My answer to the first question is that the estimate was based on evidence which the Assistant Commissioner was partly empowered to act upon and partly not empowered to act upon, and my answer to the second question is in the negative.

This being my opinion on the two questions that arise in this case and on which the learned Judges have differed, let the case go back to the Bench for final disposal.

The Bench then passed the following judgment :

NIAMAT-ULLAH and BAJPAI, JJ.:—Having regard to the decision of the Hon'ble CHIEF JUSTICE, to whom the case was referred in view of difference of opinion between the Judges composing this Bench, the two questions, which are the subject of reference under section 66 of the Income-tax Act, are answered as follows:

1. The estimate of 11 lakhs as the capital invested by the assessee is based partly on such evidence as the Assistant Commissioner was in law empowered to act upon and partly on evidence which he was not empowered by law to act upon.

2. The Assistant Commissioner was not authorised under section 13 of the Income-tax Act or otherwise to make private inquiries and to take the result of such inquiries into account in making the assessment.

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## APPELLATE CIVIL

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and  
Mr. Justice Bennet*

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AHMAD ALI KHAN AND ANOTHER (DEFENDANTS) v. RIYASAT  
ALI KHAN AND OTHERS (PLAINTIFFS)\*

*Pensions Act (XXIII of 1871), sections 6, 11, 12—Political pension—Suit by an heir against other heirs for share of pension inherited from ancestor—Collector's permission—Compromise decree—Relinquishment of claim to share of pension and of estate in lieu of monthly sum charged on ancestor's estate in defendants' hands—Whether such relinquishment valid and a lawful consideration—Compromise decree enforceable against heirs of original defendants—Family arrangement.*

With the permission of the Collector, obtained under section 6 of the Pensions Act, a suit was brought for a declaration that the plaintiff, as an heir of an ancestor who had a political pension of Rs.65 per month from Government, was entitled to a certain share thereof. The defendants, who were the other heirs and in receipt of the pension, denied the legitimacy of the plaintiff. The suit was compromised on the terms that the legitimacy of the plaintiff was recognized; that he relinquished all claims to any share of the pension or of the estate of the deceased ancestor, and that in lieu thereof he was to receive a monthly payment of Rs.50, generation after generation, which was charged against a part of the estate of the deceased ancestor in the hands of the defendants. The compromise was filed in court and a decree was passed in accordance therewith. Some years later, after the death of the original plaintiff, his heirs brought a suit for arrears of the monthly payment against the former defendants and the heirs of some of them who had died. The questions arose whether the compromise decree was valid under the Pensions Act and whether it could be enforced against heirs of the original defendants. The nature of the pension in question, though not clearly established, was assumed throughout all the stages of the litigation to be that of a political pension to which section 12 of the Pensions Act would be applicable, and the decision was given on that basis:

*Held* that the compromise and the decree based on it were legal and valid.

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\*Appeal No. 65 of 1934, under section 10 of the Letters Patent.

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[*Per* SULAIMAN, C.J.—The offer made by the plaintiff in the former suit, to abandon his claim to the pension as well as to the estate to which he might be entitled, being made in a pending suit which had been instituted after obtaining the certificate of the Collector and which was in every way cognizable by the civil court, was not unlawful or invalid. Section 12 of the Pensions Act declares to be void all private transfers, assignments, etc. voluntarily made by the person entitled to any pension mentioned in section 11; it does not govern decrees of courts passed under section 6; the word “orders” in section 12 must mean payment orders made by such a person. An abandonment of the claim and of the right to have it tried by the court would not in itself amount to an assignment of any share in the political pension, but merely the withdrawal of the suit in lieu of the consideration offered. Such a course is not obnoxious in any way to the provisions of section 12 or any other section of the Pensions Act.]

[*Per* BENNET, J.—The relinquishment of the former plaintiff's right to the pension would be null and void within the meaning of section 12. That part of the consideration for the defendants' agreement was void, but not an unlawful consideration within the meaning of sections 23 and 24 of the Contract Act; and the other part of the consideration, namely the relinquishment of the right to the estate, being valid the compromise was valid and binding.]

*Held*, also, that as the compromise was in the nature of a family arrangement in settlement of a *bona fide* dispute between the members of the family and was embodied in the decree of a competent court, and it was intended that the monthly allowance would be payable out of the estate of the deceased in the hands of the defendants, it was binding on and enforceable against the heirs of the original defendants, to the extent to which that estate of the deceased was in the hands of these heirs.

Sir *Wazir Hasan* and Mr. *Ishaq Ahmad*, for the appellants.

Messrs. *P. L. Banerji* and *M. A. Aziz*, for the respondents.

BENNET, J.:—This is a Letters Patent appeal by the defendants against a judgment of a learned single Judge of this Court. The case arises as follows. One *Aminullah Khan*, resident in *Saharanpur*, had a pension of





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Rs.65 per month from Government, and he also owned an estate. He died some time prior to 1921, leaving three sons Syed Muhammad Khan, Malik Muhammad Khan and Muhammad Ilyas. Syed Muhammad Khan died without heirs. Muhammad Ilyas had a son Aftab Ali Khan, and the two defendants appellants are the sons of Aftab Ali Khan. The father of the present plaintiff, one Samiullah Khan, along with one Adil Khan brought a suit No. 616 of 1921 against Aftab Ali Khan and others for a declaration that the plaintiffs were the heirs of the deceased Aminullah Khan and were entitled to a share of the pension. No property other than the pension was in dispute in that suit. The suit was contested on the ground that Samiullah Khan was not the legitimate son of Malik Muhammad Khan. Permission was obtained under section 6 of the Pensions Act from the Collector for this suit to be heard by the civil court. On the 8th of August, 1922, the parties entered into a compromise which was filed in court and the suit terminated by a decree in the terms of the compromise. This compromise sets out that the claim of Adil Khan to receive Rs.24-6-0 per month out of the pension of Aminullah Khan of Rs.65-2-0 per month should be decreed; secondly that Samiullah Khan plaintiff was the son of Malik Muhammad Khan, and also "in accordance with this compromise Samiullah Khan and his representatives were entitled to get Rs.50 per month, generation after generation, from Aftab Ali Khan and his representatives. It was also agreed upon that the payment of this monthly allowance of Rs.50 shall for ever remain a charge upon the property and the pension allowance of Aftab Ali Khan. In lieu of this Samiullah Khan relinquished his entire share in the property inherited from Syed Muhammad Khan and Malik Muhammad Khan." In accordance with this decree payments were made of Rs.50 per month to Samiullah Khan and the present suit has been brought by the heirs of Samiullah Khan for arrears of this amount. Samiullah Khan died

on the 25th of April, 1923, and Aftab Ali Khan died on the 23rd of December, 1927. The Munsif decided the suit in favour of the plaintiffs and the defendants filed an appeal and the lower appellate court dismissed the suit of the plaintiffs on the ground that the compromise was void under section 12 of the Pensions Act. The plaintiffs came in appeal to this Court and the learned single Judge of this Court has held that Samiullah Khan was not a person entitled to the pension within the meaning of section 12 of the Pensions Act (Act XXIII of 1871), but he was only a person who had a claim to a pension, and that the civil court in 1921 had jurisdiction to hear and decide the suit by virtue of a certificate granted under section 6 of the Pensions Act, and that having jurisdiction to determine the suit the civil court had jurisdiction to accept a compromise made between the parties and that such a compromise would be valid. Further, the learned single Judge held that under section 24 of the Contract Act in the present case the whole of the compromise would not become invalid. The learned single Judge therefore restored the decree of the trial court.

In Letters Patent appeal the first point which has been argued is that section 12 of the Pensions Act renders the compromise decree invalid. Now section 12 refers to "any pension, pay or allowance mentioned in section 11" and section 11 sets out: "No pension granted or continued by Government on political considerations or on account of past services or present infirmities or as a compassionate allowance . . . shall be liable to seizure, attachment or sequestration by process of any court, etc." There are four kinds of pension set out in section 11. Learned counsel argued that these four kinds of pension must comprise all kinds of pension other than those set out in section 7. Section 7 refers to two kinds of pension. I do not consider that this argument is correct, because there is nothing in the Pensions Act which states that the two kinds of pension in section 7

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and the four kinds of pension in section 11 comprise all possible kinds of pension; nor is there any reason to suppose that these six kinds do comprise all possible kinds of pension. Further it was argued that because a certificate had been granted in 1921 under section 6 therefore the pension in question could not have been one under section 7. Section 7 states that nothing in sections 4 and 6 shall apply to the pensions mentioned in section 7. No doubt a certificate is not required for a suit about a pension mentioned in section 7, but the mere fact that a certificate is not required does not make the proposition correct that if a certificate is granted then the pension in regard to which it is granted cannot be one mentioned in section 7. The written statement in the present suit in additional plea No. 2 set out that the deed of compromise is invalid according to law, that it is not registered nor executed on a stamped paper, that no charge can be created according to law on the pension allowance, nor is the Government pension fit to be transferred. Apparently in drafting this written statement the person who drafted it was under the impression that all kinds of Government pensions came under section 12 of the Pensions Act. This however is not correct. The defendants should have made a proper pleading in their written statement that the pension was one of the four mentioned in section 11 and it was necessary in my opinion for the defendants to produce evidence to show that the particular pension in question was one which did come under section 11 of the Pensions Act. The onus of proof of this matter was on the defendants as they set up section 12 of the Act as rendering the compromise invalid. The defendants have neither made the proper allegation nor have they produced any evidence on the point. Under these circumstances I consider that the defendants have failed to establish that the pension in question was one to which section 11 applies and that the compromise was one which would be invalid

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under section 12. I am of opinion that this is not a case in which there should be any remand for a finding on the point because the defence failed to make the proper allegations in the written statement and failed to produce any evidence on the point. The Letters Patent appeal is not the stage of a proceeding where defects in the evidence and pleadings of a party can be set aside, and there are rulings of their Lordships of the Privy Council to that effect.

However, as many other points have been argued in this case I will assume for the rest of my judgment that this defect in the case for defence does not exist.

The next question is, if the compromise was one which would be within the meaning of section 12 of the Pensions Act, what would be the effect on the compromise? Section 12 states that the assignments, agreements, etc. enumerated by it are null and void. It therefore appears that the particular part of the compromise by which Samiullah Khan relinquished all his right to the pension would be null and void. It is to be noted that the compromise does not set out that the allowance of Rs.50 per month should be paid to Samiullah out of the pension. The compromise merely provides that it should be paid as an allowance per mensem and the compromise is silent as to the source from which the payment is to be made. There is therefore nothing which could be invalid as regards section 12 in connection with the provision for the payment of Rs.50 per month. The invalidity which is alleged is in regard to the relinquishment by Samiullah of his right to the pension, and this is set out in the compromise clearly and definitely. I am of the opinion that this provision that Samiullah relinquished his right to the pension may be regarded as null and void within the meaning of section 12 (provided of course on the assumption that the pension is one under section 11). That provision is no doubt part of the consideration of the agreement. The other part of the consideration moving from Sami-

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ullah was that he gave up his right to the property which had devolved from Syed Muhammad Khan. Two considerations therefore moved from Samiullah and of these two considerations one was null and void. Now a consideration which is null and void is distinct in my opinion from a consideration which is unlawful. A consideration which is unlawful is stated by section 23 of the Contract Act to be one which is forbidden by law or is of such a nature that, if permitted, it will defeat the provisions of any law; or is fraudulent; or involves injury to the person and property of another; or is regarded by the court as immoral or opposed to public policy. Now this particular consideration is not forbidden by law, nor is it of such a nature that if permitted it would defeat the provisions of any law. The law makes this particular agreement to give up a claim to the pension null and void. There can therefore be no question of defeating the provisions of the law by recognizing that that consideration is null and void. That is not defeating the provisions of the law but that is carrying out the provisions of the law as the particular provision states that the particular agreement is null and void. The case therefore is different from a consideration which is unlawful. If there is a consideration which is unlawful, then, under section 24 of the Contract Act, even if there are other considerations which are perfectly good the agreement will still be void because the existence of one unlawful consideration taints the whole agreement and renders the whole agreement void. What I have said in regard to consideration applies equally in regard to the object of an agreement both under section 23 and under section 24. Now the case of a null and void consideration has a different effect on an agreement from a case of an unlawful consideration. Section 25 of the Contract Act provides that an agreement made without consideration is void. If therefore there is a single consideration for an agreement and that consideration is void then the agreement is one without consideration and the

whole agreement is void. But in the present case the compromise did not depend on the single consideration that Samiullah was to relinquish his right to the pension. There was also the consideration that Samiullah relinquished his right to the property. That consideration of relinquishment of his right to the property is a perfectly good consideration and therefore the compromise cannot be said to have been one without consideration moving from Samiullah. For these reasons I consider that even on this theory of the appellant the compromise would still be a valid compromise.

The next point on which argument is directed is a more difficult one and that is whether the compromise can bind the defendants, the sons of Aftab Ali who was a party to the compromise. As regards this High Court there is a ruling in the case of *Aulad Ali v. Ali Athar* (1) of a Full Bench which lays down in connection with the question of pre-emption as follows: "I am also clearly of opinion that section 37 confers that benefit and imposes the obligation upon the representatives of the parties if the parties should die before the contingency occurs." That is, it was held by the majority of that Bench that the second paragraph of section 37 of the Contract Act would apply to a case of that nature. This paragraph lays down: "Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract." In addition to that Full Bench ruling there are certain other considerations which apply to the present case. There was a *bona fide* family dispute in regard to this pension and the Collector had granted a certificate under section 6 of the Pensions Act and the civil court lawfully had the case within its jurisdiction. Under those circumstances the parties came to a compromise of this family dispute. The compromise was embodied in the decree. It appears to me that such an arrangement is intended to permanently bind the

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(1) (1927) I.L.R., 49 All., 527(531).

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members of the family. In the case of compromise decrees passed on family disputes it would be intolerable if the members who succeed the actual persons making the compromise were allowed to set the compromise aside on the simple ground that they were not parties to the compromise. Such settlement of family disputes are intended by the law to be of a permanent nature. Further there is the allegation in the plaint that the defendants are in possession of the property which was left by Aminullah Khan and the property which was left by Aftab Ali Khan. The defendants have not pleaded that they were not in possession of the property, nor did they raise this point in their grounds of first appeal to the lower appellate court. I consider that the compromise will be binding on the defendants, the sons of Aftab Ali Khan, to the extent of the property left by Syed Muhammad Khan which is in their possession. To this extent I consider that the argument is well founded that the liability of the defendants should be limited to the assets of the property left by Syed Muhammad Khan in their hands. The decree therefore should be varied to this effect. The compromise set out that the payment of Rs.50 per mensem to Samiullah should be made generation after generation so long as the property left by Syed Muhammad Khan remains in the possession of Aftab Ali Khan or in the possession of his representatives. The suit has not been brought to enforce a charge on that property, but nevertheless I consider that there is a liability on the defendants to the extent of the property in their hands.

Some further question was argued in regard to the question of registration of the compromise. At the time when the compromise was drawn up in 1922 the Registration Act was slightly different from what it is at present and in section 17(2) it provided that nothing in clauses (b) and (c) of sub-section (1) applies to any decree or order of a court. That provision of law was interpreted by their Lordships of the Privy Council in



the year 1919 in the case of *Hemanta Kumari Debi v. Midnapur Zamindari Co.* (1) at page 495, and their Lordships stated that where there was a compromise filed in court which involved property which was not the subject of the case in that court, then registration was unnecessary even in regard to that property. This is shown in the ruling of their Lordships at pages 496 to 498. Subsequently by Act XXI of 1929 this section 17(2) of the Registration Act has been amended and it now excepts a compromise decree passed in regard to property which is not the subject of the suit. But the compromise with which we are dealing was of the 8th of August, 1922, before this section 17(2) of the Act had been amended. Clearly therefore registration was not necessary for the compromise even so far as it affected the property of Syed Muhammad Khan which was not the property in dispute in that case. Various rulings have been shown to us by learned counsel for the appellant in his very able address in which he has pointed out that the mere existence of a compromise and a decree passed on that compromise does not prevent an execution court or a different court from investigating the question whether certain terms in that compromise would not amount to a penalty which would be invalid under section 74 of the Indian Contract Act. I consider therefore that it is open to us to go into the question of whether the compromise in question would or would not be valid. But, as I stated above, in my opinion learned counsel for the appellants has failed to establish that the compromise was one which is invalid. For these reasons I consider that this appeal should fail except to the extent that the decree to be granted to the plaintiffs should be against the defendants out of the assets of Syed Muhammad Khan in their hands.

SULAIMAN, C.J.:—I concur in the order proposed. No doubt there are several classes of pensions and those falling under section 7 are not subject to the provisions

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(1) (1919) I.L.R., 47 Cal., 435.



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of sections 4 and 6 of the Pensions Act (Act XXIII of 1871). It is also true that the burden is on the defendants to show that the pension in dispute in this case was of the class mentioned in sections 11 and 12. But inasmuch as it has been assumed throughout in all the courts that this was a political pension of the nature to which section 12 would be applicable, I would prefer not to base my decision on the ground that this has not been established by the defendants.

In the same way I have considerable difficulty in holding that even if the withdrawal of the claim to the political pension in the former suit was in fact an invalid and void offer, the counter promise is enforceable. So far as the Indian Contract Act is concerned, all considerations and objects of an agreement are unlawful which are of such a nature that if permitted they would defeat the provisions of any law. If, therefore, the object of an agreement is such that if carried out, it would be contrary to the provisions of any law, it would follow that it would defeat the provisions of that law and would therefore be unlawful. Reading section 23 with section 24, it would then follow that if any part of the consideration for one or more objects is unlawful, the whole agreement is void. I would, therefore, be inclined to consider that if a part of the offer made by the plaintiffs in the former suit was such that, if permitted, it would defeat the provisions of the Pensions Act, then that part of it was unlawful, with the result that the whole of the offer made by the then plaintiffs would be void and therefore the compromise made by the predecessor of the defendants would be without consideration and therefore not enforceable as against the unwilling defendants. But the promise made by the defendants' predecessor to pay so much a month was not unlawful and the consideration passing from him was not void. Hence he might have either avoided the contract or enforced that part of it which was valid provided he performed the whole of his part of the contract.

The cases of conveyances stand on a different footing for two reasons. In the first place, section 6, sub-section (h) of the Transfer of Property Act in terms does not make section 24 of the Indian Contract Act applicable to the transfers governed by the Transfer of Property Act. In the second place where one party has performed the whole of his part of the contract, and it is only the opposite party which is incompetent to perform one part of it, then it is open to the civil court to enforce the performance by the second party of that part which he is competent to perform. The present case is one where the plaintiffs' predecessor, assuming that the offer to withdraw the claim to the pension was invalid, was not in a position to perform a part of the compromise made by him, it might therefore be difficult to decree the plaintiffs' claim when one part of the compromise made was not capable of being performed. That would amount to a substitution of a new contract by the splitting up of the offer made by the defendants' predecessor so as to uphold one part of it which might be regarded as consideration for the valid part of the compromise of the then plaintiffs and not to uphold the rest. On the other hand, as the plaintiffs' predecessor never afterwards laid any claim to the pension or the estate and the defendants are in possession of these, it would be unfair to the plaintiffs if their claim is dismissed.

I am, however, of the opinion that the withdrawal of the claim to political pension made in the previous suit was in no way invalid. Even as regards cases which are governed by sections 11 and 12, there is a specific provision in section 5 that where any person has a claim relating to such pension or grant, he may prefer it to the Collector of the district who may either dispose of such claim or under section 6 grant a certificate authorising that the case relating to such complaint should be tried by a competent court. When such a certificate has been granted by the Collector, it seems to me that a civil suit filed in a civil court is a perfectly legitimate

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action. The civil court is not only competent to try it, but under section 6 of the Act is bound to take cognizance of any such claim and has to try the case and decide it. No doubt in deciding that case the civil court is not empowered to make any order or decree in the suit by which the liability of Government to pay any such pension or grant would be affected directly or indirectly, but the court is authorised to adjudicate upon the rights of the parties, if any, and the decree of the court would certainly be binding upon the parties who are before it. It therefore follows that if there had been no compromise but the suit had been tried on its merits and decided in favour of the then plaintiffs, it would not be right to say that there was any defect in the action. I agree with the learned Judge from whose judgment this appeal has been preferred that the position is the same whether the suit is decided by the court after contest or whether a decree is passed in terms of a compromise which has been entered into between the parties. The effect of the compromise was that the then plaintiffs abandoned their claim not only to their alleged share in the political pension but also to their share in the estate of the deceased Syed Muhammad. The then plaintiffs were entitled to press their claim before the court and ask the court to adjudicate upon it and if the decision was in their favour, they could have gone to the Collector armed with the decree of the court and would most probably have been able to persuade the Collector to recognize them as the pension-holders and grant the pension to them. They in consideration for what was offered by the opposite party abandoned their claim to go on with the suit and abandoned their right, if any, to the property as also the pension. I am, therefore, of the opinion that when the suit itself was maintainable, the abandonment of the claim was a valid consideration passing from the then plaintiffs which could form consideration for the compromise made by the defendants. I see no objection in a person not persisting in

his claim for a pension and abandoning the suit which he has instituted on the strength of a certificate of the Collector.

While section 6 deals with the maintainability of the suit relating to pensions, section 11 is directed against a different state of affairs. Where a political pension is sought to be seized, attached or sequestered at the instance of the creditor or in satisfaction of a decree or order of any such court, section 11 prohibits such action. Section 12, on the other hand, deals with private transfers and declares that all assignments, agreements, orders, sales and securities of every kind made by the person entitled to any pension mentioned in section 11 are null and void. Obviously this deals with voluntary assignments, etc. made by a person entitled to any pension. This section does not govern decrees of courts passed under section 6 of the Pensions Act. The word "orders" in this section must mean orders made by the person entitled to any pension and is equivalent to payment orders made by such persons. The decree itself is therefore not hit by the provisions of section 12 at all. But inasmuch as the decree is based on a private compromise, that part of the terms of the compromise which would offend against the provisions of section 12 would be invalid even though they are embodied in the compromise decree. For instance, when the political pension under the compromise was allotted to the then defendants, an attempt to create a charge on that political pension for the purpose of securing the payment of the monthly allowance to Samiullah Khan would be null and void and of no effect. But an abandonment of the claim to have the question tried by the court would not in itself amount to an assignment of any share in the political pension; but merely the withdrawal of the suit in lieu of the consideration offered. In my opinion such a course is not obnoxious in any way to the provisions of the Pensions Act.

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I am, therefore, of the opinion that the offer made by Samiullah Khan to abandon his claim to the estate of the deceased Syed Muhammad Khan as well as to the pension to which he might have been entitled, when made in a pending suit which had been instituted after obtaining the certificate of the Collector and which was in every way cognizable by the civil court, was not unlawful or invalid. The position would have been different if we had nothing but a registered compromise between the parties, which was never filed in any such suit.

The question of the liability of the heirs of Samiullah Khan is somewhat difficult; but as there was adequate consideration for the compromise, which was between the members of the family and was in the nature of a family arrangement, and it was intended that the allowance would be payable by the heirs out of the property left by Syed Muhammad Khan, there is no reason why when Samiullah Khan's heirs are not claiming any right to the political pension, they should not be entitled to enforce this compromise against the heirs of Aftab Ali Khan. The amount was intended to be payable out of the assets of the deceased and the compromise decree should certainly be binding on the heirs of the parties so long as the assets of Syed Muhammad Khan are available. I am unable to accept the contention that the proper interpretation of the compromise is that the sum of Rs.50 was to be paid out of the political pension and that the words "the property left by Syed Muhammad Khan" would include the political pension as well. The contrary is clear from the later portion of the document in which a distinction is drawn between the property which had devolved from Syed Muhammad Khan and Malik Muhammad Khan and the pension which had devolved from three persons, Malik Muhammad, Syed Muhammad and Aminullah Khan. In view of the pronouncement of their Lordships of the Privy Council

in the case quoted by my learned brother, the want of registration is not fatal.

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BY THE COURT:—This appeal is allowed in part and the decree of the learned Judge of this Court is modified to this extent that the plaintiffs' claim for the recovery of the amount sued for is maintained but it is ordered that the same would be realisable out of the assets, if any, left by Syed Muhammad Khan, now in the hands of the present contesting defendants. As the appeal has failed substantially, the respondents should get their costs from the appellants who should bear their own costs.

### REVISIONAL CIVIL

*Before Justice Sir Charles Kendall*

RAGHUBIR DAS (DEFENDANT) v. SITAL PRASAD RAO AND  
OTHERS (PLAINTIFFS)\*

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*Civil Procedure Code, section 115 ; order XXIII, rule 1—Withdrawal of suit with liberty to bring fresh suit—Granted by appellate court—Grounds—Revision.*

A suit for a declaration relating to certain shops was dismissed on the merits and *inter alia* on the ground of section 42 of the Specific Relief Act. During the course of the appeal the plaintiffs appellants applied for leave to withdraw the suit under order XXIII, rule 1, on the ground that there was a fatal defect, namely the omission to claim an alternative relief in the event of their being found to be out of possession. The appellate court granted the application, but its order did not show any reasons for doing so ; it did not even describe what the formal defect was, nor discuss whether it was a fatal defect:

*Held*, that although the High Court was very reluctant to interfere in revision with orders passed under order XXIII, rule 1, it should interfere where it considers that the lower court has not applied its mind to the matter before it, or, in other words, has not exercised its discretion in a judicial manner; where the court has not observed the rule and has not had before it the considerations by which it ought to be guided in the exercise of its discretion.

\*Civil Revision No. 626 of 1934.

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*Jhunku Lal v. Bisheshar Das* (1), *Chiranji Lal v. Irphan Ali* (2), and *Kali Ram v. Dharman* (3), distinguished.

Mr. *Shiva Prasad Sinha*, for the applicant.

Mr. *Muhammad Ismail*, for the opposite parties.

KENDALL, J.:—This is an application for the revision of an appellate order passed by the Subordinate Judge of Gorakhpur allowing the opposite parties to withdraw their suit under order XXIII, rule 1 of the Code of Civil Procedure. The circumstances briefly are that the plaintiffs had brought a suit for a declaration that they alone were entitled to realise the dues from certain shopkeepers, and they also claimed an injunction against interference with this alleged right. The Munsif after taking all the evidence and hearing arguments dismissed the suit. The plaintiffs appealed, but during the course of the appeal they made an application to be allowed to withdraw the suit on the ground that there was a formal defect, namely that they had not claimed an alternative relief in the event of their being found not to be in possession of the property; and as the trial court had dismissed the suit in accordance with the provisions of section 42 of the Specific Relief Act, this defect was fatal to the suit, and therefore they prayed that they should be allowed to withdraw it with liberty to institute a fresh suit. The appellate court without discussing the merits of the application remarked that there was a patent defect and that the suit might be withdrawn, but directed that costs should be paid to the respondents; and the order which I am asked to revise is a subsequent one passed in the following words: "Costs of both the courts paid to respondent. The plaintiff is allowed to withdraw the suit, with liberty to file a fresh separate suit. Appeal disposed of accordingly."

There can be no doubt that permission was given because the plaintiffs had claimed that the provisions of section 42 of the Specific Relief Act were fatal to the suit as it stood, and although the court has not in so many

(1) (1918) I.L.R., 40 All., 612.

(2) [1935] A.L.J., 277.

(3) [1934] A.L.J., 821.



words given this as the reason for permitting the suit to be withdrawn, it is argued on behalf of the opposite parties that this undoubtedly was the reason, and that it did amount to a formal defect in the suit as it originally stood. I have been referred to the judgment of the trial court, which has disposed of the plaintiffs' case for a number of reasons and only mentioned section 42 of the Specific Relief Act by the way. There is no issue relating to section 42 of the Act, and it was not by any means the only reason the Munsif had for dismissing the suit.

It is quite clear that the orders passed by the learned Subordinate Judge are defective in that they do not show his reason for allowing the plaintiffs' application. He has not even described what the formal defect was, nor has he discussed the question of whether it was a defect that may be fatal to the suit. All he has done is to remark that there was a "patent" defect.

In support of his order I have been referred to a decision of a Bench of this Court in the case of *Jhunku Lal v. Bisheshar Das* (1), in which it was held that where a court had given leave to the plaintiff to bring a fresh suit, the fact that the court may have exercised, and probably did exercise, a wrong discretion in granting the plaintiff's application was not sufficient to bring the case within the purview of section 115 of the Code of Civil Procedure. This was followed in the case of *Chiranji Lal v. Irphan Ali* (2). This latter Bench in following the earlier decision remarked that the earlier Bench had held that even if the court below had exercised a wrong discretion (not merely might have exercised a wrong discretion) in granting leave to withdraw the suit, the case would not come under section 115 of the Civil Procedure Code. In another case, *Kali Ram v. Dharman* (3), another Bench of this Court remarked that where the court had exercised its discretion the order should not be interfered with by the High Court in the

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(1) (1918) I.L.R., 40 All., 612

(2) [1935] A.L.J., 277.

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exercise of its revisional powers. In this case the Bench was clearly of opinion that the lower court had not exercised a proper discretion.

I cannot, however, find in any of these decisions which have been quoted on behalf of the opposite parties that there is any authority for holding that this Court should not interfere if it considers that the lower court has not applied its mind to the matter before it, or in other words, has not exercised its discretion in a judicial manner. In the present case the question before the court was whether the formal defect which undoubtedly existed must necessarily be fatal to the suit. That question, as I have already remarked, the court has not discussed, and does not appear to have considered. There is nothing to show why the plaintiff should not have applied for an amendment of his plaint, as is frequently done in similar suits under the Specific Relief Act. It is true that it was a late stage at which to amend the plaint, because the matter had already come before the appellate court. But the same objection of course applies to an application to withdraw the suit under rule 1 of order XXIII. It may be that the plaintiffs believed that the court would not have granted a prayer for the amendment of the plaint, and the court may also have been of that opinion. But if the question had been discussed and the court had decided that it was too late a stage at which to allow the amendment of the plaint, it would also have had to consider whether it was not too late a stage at which to allow the suit to be withdrawn, and in fact the matter would have been fully discussed and the question of whether rule 1 of order XXIII could be properly applied would have been satisfactorily decided.

The order of the lower appellate court appears to me to be objectionable on two grounds. Firstly, it is in itself defective because it does not disclose that the court has applied its mind to the matter and exercised its discretion judicially, and secondly the order appears to

be on the face of it a wrong order, in that the defect referred to by the plaintiff in his application as a ground for being allowed to withdraw the suit need not necessarily have been fatal to the success of the suit, so that apparently the court had not jurisdiction under the provisions of order XXIII to allow the suit to be withdrawn. It is true that this Court has been very reluctant to interfere in revision with orders passed under order XXIII, rule 1. But the reluctance has been in every case to interfere with the discretion of the court. Where the court has not observed the rule and has not had before it the considerations by which it ought to be guided, I think it is certainly proper to exercise the revisional powers of this Court. The fact of doing so in the present case will, so far as can be seen, be greatly to accelerate the disposal of the litigation between the parties. I therefore allow the application with costs, set aside the order passed by the lower appellate court, and direct that the appeal be now readmitted to its original number and disposed of according to law.

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### APPELLATE CIVIL

Before Justice Sir Charles Kendall and Mr. Justice Iqbal Ahmad

AIJAZ AHMAD (DEFENDANT) v. NAZIR-UL-HASAN  
(PLAINTIFF)\*

1935  
April, 29

*Civil Procedure Code, sections 68, 70, 71—Execution transferred to Collector for sale of zamindari property—Sale held and confirmed, and execution record re-transmitted to civil court—Subsequent application to Collector to set aside sale on the ground of fraud—Jurisdiction—Inherent power to cancel previous order for the ends of justice—Suit challenging order setting aside sale after confirmation.*

A Collector has jurisdiction to set aside the sale of immovable property held in execution of a decree transferred to him by the civil court under section 68 of the Civil Procedure Code, after the sale has been confirmed by him and the record has

\*First Appeal No. 370 of 1929, from a decree of Chatur Behari Lal, First Additional Subordinate Judge of Jaunpur, dated the 8th of August, 1928.

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been re-transmitted to the civil court, if he is satisfied that the decree-holder, by the exercise of fraud, kept the judgment-debtor ignorant of the execution proceedings culminating in the sale of the property and of the confirmation of sale, when as a consequence of his fraud the decree-holder succeeded in purchasing the property of the judgment-debtor for much less than its real value.

A Collector when executing a decree transferred to him under section 68 may not be a "court", but an order passed by him either confirming or setting aside a sale is certainly a judicial order. An officer acting judicially has, just like a court, inherent jurisdiction to recall and cancel his invalid orders and to make such orders as may be necessary for the ends of justice or to prevent abuse of process. Fraud vitiates all proceedings including judicial orders, and if the Collector is satisfied that the decree-holder perpetrated fraud not only in publishing or conducting the sale but also in keeping the judgment-debtor ignorant of the fact of the confirmation of the sale, he has inherent power to set aside the sale with a view to prevent an abuse of the proceedings held by him.

Such exercise of inherent power in the present case would not be acting in contravention of the provisions of any rule of law. Rule 998 of the Manual of Orders, Revenue Department, which has been framed by the Local Government under section 70 of the Civil Procedure Code, prohibits the challenging of an order confirming a sale, but that rule is restricted in its scope to the grounds mentioned in rules 996 and 997 for setting aside a sale, and has no application to cases in which the order confirming the sale has been secured by the auction purchaser by the exercise of fraud. Further, rule 998 prohibits the institution of a suit and not the exercise of the inherent power possessed by an officer acting judicially to correct his judicial orders.

The re-transmission of the decree to the civil court no doubt put an end to the jurisdiction of the Collector to take further proceedings in execution of the decree, but it could not divest him of the inherent jurisdiction possessed by him to correct his judicial orders or to review the same. The inherent power vested in a court, or in an officer acting judicially, to set right judicial orders previously passed does not depend on the continuance of the proceedings in the course of which the order was passed, but can be exercised even if the proceedings have terminated.

*Nand Kishore v. Badan Singh* (1), disapproved.

(1) (1926) I.L.R., 48 All., 568.

Dr. S. N. Sen and Mr. Shiva Prasad Sinha, for the appellant.

Messrs. P. L. Banerji and A. M. Khwaja, for the respondent.

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KENDALL and IQBAL AHMAD, JJ.:—The question of law that arises in the present appeal is whether a Collector has jurisdiction to set aside the sale of immovable property held in execution of a decree transferred to him by the civil court in accordance with the provisions of section 68 of the Code of Civil Procedure, after the sale has been confirmed by him and the record of the execution case has been re-transmitted to the civil court, if he is satisfied that the decree-holder, by the exercise of fraud, kept the judgment-debtor ignorant of the execution proceedings culminating in the sale of the property and of the confirmation of sale, when as a consequence of his fraud the decree-holder succeeded in purchasing the property of the judgment-debtor for much less than its real value.

The plaintiff respondent held a decree for costs for a sum of Rs.1,585 against Muhammad Munawar, the predecessor in interest of the defendants. The plaintiff applied for execution of the decree by attachment and sale of 1 anna 2 pies share out of 4 annas 4 pies in village Sarai Kheta belonging to the judgment-debtor. The civil court transferred the decree for execution to the Collector. A proclamation of sale was issued by the Collector showing an encumbrance of Rs.30,000 on the 4 annas 4 pies share. The 1 anna 2 pies share that was advertised for sale was actually sold by the Collector on the 22nd of September, 1922, and was purchased by the decree-holder for a sum of Rs.1,000 and the sale was confirmed by the Collector on the 26th of October, 1922. The record of the execution case was thereafter sent back by the Collector to the civil court in May, 1923. The decree-holder obtained the sale certificate on the 20th of August, 1925, and formal delivery of possession was made over to him on the 14th of October, 1925.

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Within a month of the date of delivery of possession, viz. on the 12th of November, 1925, Muhammad Munawar, the judgment-debtor, filed an application before the Collector for setting aside the sale. The application was based mainly on the allegation that the decree-holder by the exercise of fraud kept the judgment-debtor utterly uninformed of the execution proceedings, and thus succeeded in purchasing property of considerable value at a very low price. It was stated in the application that the decree-holder intentionally did not allow notice of the execution proceedings to be served on the judgment-debtor, and took steps to prevent the judgment-debtor from getting information of the proclamation of sale or of the fact that the property was ordered to be sold. It was further alleged that no proclamation of sale was made by beat of drum as required by the rules and that, in consequence of the fraudulent proceedings of the decree-holder, no intending purchasers except the decree-holder were present on the date fixed for sale and thus the decree-holder succeeded in purchasing property of the value of Rs.21,000 for a sum of Rs.1,000 only. The judgment-debtor also asserted that the decree-holder, to conceal his fraudulent proceedings and to keep the judgment-debtor ignorant of the fact of the auction sale, intentionally did not obtain the sale certificate for about three years after the date of the sale, and, with the same object in view, omitted to take out execution for the remaining decretal amount, viz. the sum of Rs.585 and allowed the same to become time barred.

The application was filed long after the expiry of 30 days from the date of the sale, but the judgment-debtor claimed the benefit of the provisions of section 18 of the Limitation Act on the ground that he was, by the fraud of the decree-holder, kept from the knowledge of the fact of the sale till the 14th of October, 1925, the date on which possession was delivered to the decree-holder. The judgment-debtor accordingly maintained that the

period of limitation should be computed from the date on which the fraud of the decree-holder came to his knowledge, viz. from the 14th of October, 1925, and as the application was made within 30 days of that date, it was within time.

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The application was opposed by the decree-holder, and the Collector called for a report from the Tahsildar. The report of the Tahsildar was in favour of the judgment-debtor. He reported that the decree-holder, who was the lambardar of the village, "abused his position by practising fraud on the drummer and the witnesses" who attested the sale proclamation, with the result that no purchaser except the decree-holder was present at the time of the auction sale and that the decree-holder succeeded in getting his bid of Rs.1,000 accepted by showing an encumbrance of Rs.33,000 which "was also a trick played by" him. He held that the value of the property was much more than Rs.1,000, and attributed the omission of the decree-holder to obtain the sale certificate for a period of about three years and to execute the decree for the sum of Rs.585 to his anxiety to keep the judgment-debtor ignorant of the fact of the sale. He accordingly recommended that the sale be set aside. The Collector agreed with the opinion expressed by the Tahsildar and passed an order setting aside the sale on the 4th of January, 1926.

The suit giving rise to the present appeal was then brought by the decree-holder auction purchaser, for a declaration that he was the owner in possession of the 1 anna 2 pies share and that the order of the Collector setting aside the sale was without jurisdiction. In the alternative, the plaintiff prayed for a decree for possession of the 1 anna 2 pies share. Muhammad Munawar resisted the suit on the same allegations on which the application for setting aside the sale was based. Muhammad Munawar died during the pendency of the suit in the court below, and his legal representatives were brought upon the record as defendants to the suit.

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At the trial the plaintiff wanted to adduce evidence to prove that the proclamation of sale was made by beat of drum, and that the judgment-debtor had full knowledge of the execution proceedings and of the sale of the property. But the learned counsel for the defendant judgment-debtor objected to the reception of the evidence on the ground that, if the Collector had jurisdiction to set aside the sale, it was not open to the civil court to go into the question whether or not the Collector was right in holding that the sale was vitiated by fraud that was perpetrated by the decree-holder. The court below accepted the contention of the defendant's counsel and held that the only question that called for determination in the case was whether or not the Collector had jurisdiction to set aside the sale after he had confirmed the same. It accordingly proceeded to hear arguments on the point, and held that the Collector had no jurisdiction either to set aside the sale, or to review the order confirming the sale, after the sale had been confirmed and the record of the execution case was re-transmitted to the civil court. It observed that after the confirmation of the sale only the civil court had jurisdiction to set aside the sale on the ground of fraud and, accordingly, the order passed by the Collector on the 4th of January, 1926, setting aside the sale was without jurisdiction. It, therefore, passed a decree in the plaintiff's favour for possession of the share in dispute.

In support of its view the court below placed reliance on the decision of this Court in *Nand Kishore v. Badan Singh* (1). It was held in that case that after a sale has been confirmed by the Collector and the decree has been re-transmitted to the civil court, the Collector has no jurisdiction to set aside the sale, though he is competent to "make any correction in the sale certificate to make it conform with the proclamation of sale, as a consequential or incidental exercise of the authority vested in him to grant a certificate of sale after the sale is confirmed."

(1) (1926) I.L.R., 48 All., 568.

One of the legal representatives of Muhaammad Munawar has come up in appeal to this Court, and it is argued on his behalf that the view of law taken by the court below is erroneous. In our judgment this contention is well founded and ought to prevail.

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That the orders passed by a Collector confirming or setting aside a sale held by him in execution of a decree transferred to him in accordance with the provisions of section 68 of the Code of Civil Procedure are judicial orders admits of no doubt. The Local Government has, in exercise of the powers vested in it by section 70(1) of the Code of Civil Procedure, made rules conferring upon the Collector the power to set aside a sale on grounds similar to those provided for by order XXI, rules 89 and 90 of the Code of Civil Procedure (*vide* rules 996 and 997 of Manual of Orders of the Government of the United Provinces in the Revenue Department, volume I). Similarly rule 998 framed by the Local Government confers on the Collector the power to confirm or to pass an order setting aside the sale on grounds similar to those provided for by order XXI, rule 92 of the Code of Civil Procedure. The orders passed by the Collector or his gazetted subordinates are further made appealable by the rules to higher revenue authorities. It cannot, therefore, be disputed that the Collector has powers similar to the powers conferred on the civil courts by the Code of Civil Procedure to confirm or to set aside a sale. The order of the Collector confirming or setting aside a sale, therefore, stands on an identical footing with similar orders passed by civil courts in execution proceedings, and as the orders passed by civil courts are judicial orders the orders passed by the Collector must necessarily be judicial orders. Further it is provided by the Code itself that in executing a decree transferred to the Collector under section 68 the Collector and his subordinates shall be deemed to be acting judicially (*vide* section 71 of the Code of Civil Procedure). It is, therefore, manifest that an order passed by a Collector either



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confirming or setting aside a sale is a judicial order, and the question that arises for consideration in the present appeal is whether or not the Collector has inherent power to recall and cancel his order confirming or setting aside a sale if he is satisfied that it is necessary to do so for the ends of justice or to prevent abuse of the process to which resort must be had by him in executing the decree transferred to him under section 68.

It is well settled that a court has inherent jurisdiction to recall and cancel its invalid orders, and to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. On principle there is no difference between an order passed by a court and an order passed by an officer acting judicially. The orders passed by both are judicial orders; and if a court has inherent power to correct its judicial orders there seems no justification for holding that an officer acting judicially has not similar powers. If a court has power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court, an officer acting judicially must on principle have similar powers. It may be that the Collector when executing a decree transferred to him under section 68 is not a "court"; but that fact by itself cannot divest him of the power to correct or to cancel his judicial orders, provided valid grounds exist for doing so.

It is true that neither a court nor an officer acting judicially has power to dispense with the provisions of any legislative enactment or to do that which is prohibited by any rule of law; but there is no rule of law that debars a Collector from recalling his order confirming a sale if he is satisfied that the order ought to be recalled in order to secure the ends of justice. Rule 998 framed by the Local Government prohibits the institution of a suit for challenging an order confirming or setting aside a sale; but that rule is restricted in its scope to the grounds mentioned in rules 996 and 997 for setting aside a sale, and has no application to cases in which the order con-

firming the sale has been secured by the auction purchaser by the exercise of fraud. Further, rule 998 prohibits the institution of a suit and not the exercise of the inherent power possessed by an officer acting judicially to correct his judicial orders. Fraud vitiates all proceedings including judicial orders, and if the Collector is satisfied that the decree-holder perpetrated fraud not only in publishing or conducting the sale but also in keeping the judgment-debtor ignorant of the fact of the confirmation of the sale, he has, in our judgment, inherent power to set aside the sale with a view to prevent an abuse of the proceedings held by him.

But it is argued that the Collector becomes *functus officio* after re-transmitting the decree to the civil court and thereafter has no jurisdiction to set aside the sale, and in support of this contention reliance is placed on the decision in *Nand Kishore v. Badan Singh* (1). We are unable to agree with this contention. The re-transmission of the decree to the civil court no doubt puts an end to the jurisdiction of the Collector to take further proceedings in execution of the decree, but it cannot divest him of the inherent jurisdiction possessed by him to correct his judicial orders or to review the same. The inherent power vested in a court or in a judicial officer to set right judicial orders previously passed does not depend on the continuance of the proceedings in the course of which the order was passed, but can be exercised even if the proceedings have terminated. This was the view taken by a Full Bench of this Court in *Muhammad Hanif v. Ali Raza* (2). In that case a decree was transferred for execution by the Subordinate Judge of Cawnpore to a civil court in Allahabad. An application for execution was made in the Allahabad court, to which the judgment-debtor objected on the ground that the decree had been adjusted out of court under a private arrangement. On the date fixed for the hearing of the objection the decree-holder

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(1) (1926) I.L.R., 48 All., 568.

(2) (1933) I.L.R., 55 All., 391.

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was absent, and his pleader stated that he had no instructions. The Allahabad court then heard the objection and allowed it *ex parte*. The execution case was then struck off and a certificate was sent to the Cawnpore court stating that the decree had been fully satisfied and that the case had been disposed of. Thereafter the decree-holder made an application in the Allahabad court for the setting aside of the *ex parte* order on the ground that he had been prevented by sufficient cause from not appearing on the date of hearing. The court entertained the application and set aside the previous *ex parte* order allowing the objection and dismissing the application for execution, and restored the execution case to the file of pending cases. The Full Bench held that the Allahabad court had jurisdiction to pass the order that it did, and observed at page 896: "The decree-holder applied invoking inherent jurisdiction of the court to set aside an *ex parte* order to meet the ends of justice. The proper court to entertain such an application was obviously the very court which had passed the order which was sought to be set aside. The inherent jurisdiction vested in that court, and not in the Cawnpore court which could not properly consider the propriety of the previous order. If a question arose for a review of judgment or for setting aside an *ex parte* order, that jurisdiction could be properly exercised by the court which passed the previous order. This is not a case of a further execution of the decree, which cannot be ordered after the satisfaction had been recorded and certificate sent to the original court, but a question as to whether a previous proceeding should or should not be re-opened." These observations make it abundantly clear that the inherent jurisdiction possessed by a court to which a decree is sent for execution does not terminate with the conclusion of the execution proceedings in that court. It, therefore, follows that the Collector is not divested of the inherent jurisdiction possessed by him

simply because of the termination of the execution proceedings and the re-transmission of the decree to the civil court. In *Nand Kishore's* case (1) the order of the Collector setting aside the sale was sought to be supported in this Court on the ground that the Collector could, in exercise of the power of review vested in him, set aside a sale. But this Court overruled this contention on the ground that there was nothing in the order of the Collector in that case to suggest that he was exercising the power of review. In the case before us, however, we find that in the application that was made by Muhammad Munawar for setting aside the sale he requested the Collector to review his order confirming the sale. Apart from this, in our judgment the decision in *Nand Kishore's* case (1) cannot be reconciled with the Full Bench decision of this Court noted above.

For the reasons given above we hold that the Collector had jurisdiction to set aside the sale and the propriety of his order could not be called in question in the civil court. We accordingly allow this appeal, set aside the decree of the court below and dismiss the plaintiff's suit with costs here and below.

### MISCELLANEOUS CIVIL

*Before Mr. Justice Bennet*

SMURTHWAITE (PETITIONER) *v.* SMURTHWAITE  
(RESPONDENT)\*

*Indian and Colonial Divorce Jurisdiction Act, 1926 (16 and 17  
Geo. 5. ch. 40)—Petition for divorce—Court fees.*

1935  
May, 1

The court fee payable on a petition for divorce under the Indian and Colonial Divorce Jurisdiction Act of 1926 is Rs.2. The court, in hearing such a petition, does not apply the Indian Divorce Act, and, therefore, the court fee applicable to that Act can not be applied to a petition under the Indian and Colonial Divorce Jurisdiction Act of 1926.

\*Stamp Reference in Matrimonial Suit No. 3 of 1935.

(1) (1926) I.L.R., 48 All., 568.

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Mr. T. A. Bradley, for the petitioner.

BENNET, J.:—This is a reference by the Taxing Officer on the question of what is the proper court fee for a petition for divorce under the Indian and Colonial Divorce Jurisdiction Act of 1926. The stamp reporter reported that in such petitions a court fee of Rs.20 had always been paid under article 20, schedule II of the Court Fees Act. Learned counsel for the petitioner contended that the petition for divorce was not under the Indian Divorce Act and that article 20 only refers to a petition for divorce under the Indian Divorce Act. Learned counsel therefore contended that the proper court fee was Rs.2. The Indian and Colonial Divorce Jurisdiction Act is not merely an Act conferring jurisdiction on this Court but the Act further sets out in section 1, proviso (a), that the decree shall be granted only on grounds according to the law for the time being in force in England. The court therefore in hearing this petition does not apply the Indian Divorce Act and therefore the court fee applicable to the Indian Divorce Act cannot be applied to a petition under the Indian and Colonial Divorce Jurisdiction Act of 1926. For these reasons I consider that the report of the stamp reporter is incorrect. I hold that the proper court fee of Rs.2 has been paid in this case and therefore the petition should proceed. I do not think that a notice should issue to the Government Advocate.

## FULL BENCH

*Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Thom, Mr. Justice Niamat-ullah, Mr. Justice Rachhpal Singh, and Mr. Justice Bajpai*

UDAYPAL SINGH (PLAINTIFF) *v.* LAKHMI CHAND  
(DEFENDANT)\*

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*Limitation Act (IX of 1908), section 20—Payment of interest “as such”—Payment by debtor without any specification whether it was towards interest or principal, and appropriated by creditor towards interest—Whether limitation saved thereby—Interpretation of statutes—Words, ignoring of—Civil Procedure Code, order VII, rule 6—Ground other than the one pleaded for exemption from limitation—Limitation Act, section 19—Acknowledgment.*

*Held* by the Full Bench (THOM and BAJPAI, JJ., *contra*) that where money is paid by a debtor without specifying whether the payment is towards interest or towards principal, leaving it to the option of the creditor to appropriate it as he likes, and the creditor appropriates it wholly towards interest due, there is neither a payment of interest as such nor a part payment of the principal within the meaning of section 20 of the Limitation Act.

The words “paid as such” in the first paragraph of section 20 necessarily imply that the interest must have been paid professedly as interest at the time of payment, i.e. the debtor must have paid the amount with the intention that it should be paid towards interest and there must be something to indicate that intention; the mere appropriation by the creditor of the payment to interest can not take the place of such an indication. A mere unspecified payment of money, which subsequently by the act of the creditor becomes a payment of interest, is not payment of interest “as such” within the meaning of section 20.

The fact that the legislature had considered it necessary to have two separate paragraphs in section 20, dealing respectively with the payment of interest and part payment of principal, and that the language and the provisions in respect of them were distinct, clearly indicates that the words “as such”, used in connection with the one but not with the other, are of special significance and not in any way superfluous. The meaning and importance which had been attached to these words by the

\*Civil Revision No. 408 of 1934, connected with Civil Revision No. 219 of 1934.

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Courts must have been accepted by the legislature, inasmuch as no alteration was thought necessary to be made in the language of the first three paragraphs of the section when it was reproduced in the Act of 1908, showing thereby that the words "as such" were not regarded as purposeless or redundant.

The only difference which the amendment of 1927 has made is in the proviso to section 20, and it is that the handwriting of the person making the payment is now necessary for both the payments mentioned in the section, and not only for part payment of the principal as before. But this extension of the necessity to have a writing in case of both the payments does not in any way imply any radical change in the substantive section itself, which the legislature has left untouched; it is not intended to affect and can not affect the meaning and significance of the words "as such" which had been accepted and adhered to by the legislature. Nor is there anything in the amendment which would necessarily render the words superfluous, anomalous or absurd. All the words of the section ought to be given their proper meaning and no words should be considered to be superfluous unless there is no other possible option.

The law of limitation imposes certain arbitrary time limits on suits; and there may not be any clear principle of equity underlying such restrictions, which are entirely a matter of policy. The interpretation of sections in such an enactment has to be made strictly according to the language employed, and not on a consideration of what ought to be the law.

[*Per THOM, J.*—When a debtor makes a payment, without specifying whether it is towards interest or towards principal, then it is reasonable to infer that he intends the payment to be towards interest, and the court, in the absence of any evidence to the contrary, is entitled to hold that the payment is a payment towards interest.

[The payment was either towards interest, or was part payment of principal, or partly towards interest and partly towards principal; and whichever be the case, a fresh period of limitation would begin to run under section 20 from the date of payment.

[The words "as such" in the section appear to be redundant. A payment of interest is a payment of interest, and it is no more a payment of interest if the words "as such" are added. Any other interpretation would lead to the absurd result that though the payment made without specification *must* either be towards interest or towards principal or partly towards both, it will not give a fresh start to limitation. According to rules of interpretation of statutes it is permissible to ignore or reject words

which are redundant or which lead to an absurd result. There is no reason for giving the same meaning, as might have been given prior to the amendment of 1927 by which the legislature intended to put payment towards interest and part payment of principal on exactly the same footing, to the words "as such" in the amended section if thereby the intention of the legislature is defeated or a palpable absurdity results.]

[*Per. BAJPAI, J.*—The plaintiff in his plaint stated that the payment was made by the debtor towards interest as such. If the court holds that it was not a payment of interest as such, then it would be wrong, while rejecting this part of the plaintiff's admission, to pin him down to the other part of it, namely the implied admission in the plaint that he appropriated the amount towards interest. If it was not a payment of interest, it must obviously be taken as part payment of principal. The section does not require a part payment of principal to be made "as such". A fresh period of limitation would therefore run from the date of the payment.

[The plaintiff having mentioned one ground of exemption from the law of limitation in the plaint, namely that the payment was of interest as such, was not debarred by the provisions of order VII, rule 6 of the Civil Procedure Code from obtaining exemption from limitation on some other ground established on facts, namely that the payment must be taken to be a part payment of principal. There would be no prejudice to the defendant in this case by allowing the plaintiff to allege that the payment should be considered as part payment of principal.

[After the amendment of 1927, payment of interest and part payment of principal are intended to stand on the same footing, and the words "as such" have now lost much of their former importance and significance.]

*Held*, also, by the Full Bench, that the endorsement on the back of the bond of the payment of Rs.50 on a particular date, without any further specifications or details, did not operate as an acknowledgment within the meaning of section 19 of the Limitation Act.

Mr. G. S. Pathak, for the applicant.

The opposite party was not represented.

And in the connected case:

Mr. Panna Lal, for the applicant.

Mr. Kamta Prasad, for the opposite parties.

SULAIMAN, C.J.:—This is an application in revision from a decree of the court of small causes dismissing

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a suit on the basis of a simple money bond. The bond was executed on the 7th of October, 1927, and was for Rs.100 bearing interest at Rs.3-2 per cent. per mensem, compounded every six months. On the 17th of August, 1930, there was an endorsement made on the back of this bond stating that Rs.50 were deposited on that date. Under this endorsement appeared the thumb-marks of the two executants. There was no specification in the endorsement as to whether the amount was paid towards interest, or towards part of the principal, or partly towards interest and partly towards principal. The plaintiff filed his suit on the 17th of August, 1933, on the allegation that the defendants had paid the amount of Rs.50 towards interest and he credited the same in his account towards interest, and claimed the principal sum together with the balance of the interest, giving up a small portion of interest. The court below has dismissed the suit holding that it was barred by time.

The matter came up before a learned Judge of this Court who referred the case to a larger Bench, which has referred it to this Bench.

The reason for the constitution of a large Bench is that there has been some conflict of opinion in this Court on the proper interpretation of section 20 of the Limitation Act. In the plaint there was no mention, as required by order VII, rule 6, that exemption from limitation was claimed on account of any acknowledgment in writing of the liability to pay, but exemption was sought on the ground that the amount had been paid towards interest.

Other subsidiary questions have also been argued before us, but we think that this Bench should dispose of only the main question of law on which there is a conflict of opinion, leaving other matters to be decided by the Bench concerned. Under section 3 of the Limitation Act it is the duty of the court to dismiss a claim as time barred if it is brought beyond the period

prescribed in the schedule; but limitation may be saved if the plaintiff can bring himself within one of the exceptions. The burden, therefore, lies on the plaintiff to show that his case falls strictly within the scope of any such exception.

Now the substantive section 20, as distinct from the proviso thereto, has remained unaltered ever since 1877. Section 20 of Act XV of 1877 consisted of five paragraphs, the first three of which were as follows:

"When *interest* on a debt or legacy is, before the expiration of the prescribed period, *paid as such by the person liable* to pay the debt or legacy, or by his agent duly authorised in this behalf,

or when *part* of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorised in this behalf,

a new period of limitation, according to the nature of the original liability, shall be computed from the time when the payment was made."

The legislature had considered it necessary to have two separate paragraphs dealing with the payment of interest and part payment of principal with separate marginal notes. The words used were different and the provisions in respect of them were distinct.

While that Act was in force, courts in India attached special importance to the words "paid as such" in respect of payment of interest, and did not regard them as in any way superfluous. For instance, in the case of *Kariyappa v. Rachapa* (1) at page 499 it was pointed out that "The important words are at the commencement—'interest paid, as such, by the person liable to pay'" and further that "While the forms of payment may differ, the section provides that it must be a payment made as interest by the debtor to the creditor. Mere crediting by the debtor in his own account books of interest is not enough to satisfy the statute. It must be interest paid as interest and distinctly stated to be so at the time of payment, or there must be evidence from which payment as interest may be distinctly inferred."

(1) (1900) I.L.R., 24 Bom., 493.

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Similarly in *Muhammad Abdulla Khan v. Bank Instalment Co.* (1) a Bench of this Court held that under section 20 the payment of interest will save limitation when the payment is made as such, that is to say, that the debtor has paid the amount with the intention that it should be paid towards interest and there must be something to indicate that intention; the mere appropriation by the creditor of these payments to interest is not such an indication. That was a case where the debtor in making the payments had on no occasion specified how they were to be appropriated and there was no other indication whatsoever to show that he had made the payments towards interest as such. The Bench accordingly held that the claim of the plaintiff was not saved from the operation of limitation by the payments so made.

And yet the legislature when enacting Act IX of 1908 did not think it at all necessary to alter the language of the substantive section, and the first three paragraphs were reproduced verbatim. The necessary inference to be drawn from their reproduction is that the legislature accepted the importance attached to the use of the words "paid as such" which had occurred in the earlier Act. Had those words been in any way superfluous or redundant, courts would not have emphasised their significance, and the legislature would certainly have deleted them. Accordingly in the case of the *Bank of Multan, Ltd. v. Kamta Prasad* (2) it was held by another Bench that sums paid by the debtor on various dates and credited to the account and set off against the pre-existing debt in the absence of any specification cannot be treated as payments made on account of interest as such nor would they save limitation as part payment of principal when there was no handwriting of the debtor. See also *Narain Das v. Chandrawati Kuar* (3) and *U Ba Gyi v. U Than Kyauk* (4).

(1) (1909) I.L.R., 31 All., 495.

(3) A. I. R., 1929 Oudh, 479.

(2) (1916) 14 A.L.J., 949.

(4) (1929) I.L.R., 7 Rang., 522.

In 1927 the legislature amended the proviso to section 20, which shall be considered hereafter, but again did not think it advisable to change the substantive section itself. It, therefore, follows that unless the old interpretation of this substantive section has become impossible, or there is anything else repugnant to maintaining its old interpretation, the words which are still retained must be given their full and natural meaning. All the words used in this section ought to be given their proper meaning and no words should be considered to be superfluous unless there is no other possible option.

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In the case of *M. B. Singh and Co. v. Sircar and Co.* (1) it was laid down that a part payment of principal, appearing in the handwriting of the person making it, is not required by section 20 of the Limitation Act to be expressly stated as being such; it is sufficient if it evidences a payment. It is not quite clear from the judgment, but probably the substantial sums of money paid under three cheques amounted to more than the interest due, in which case, when the creditor had failed to show that at the time the amount was paid as interest, the Bench found it possible to treat the payment as having been made towards the principal. On the other hand, in the case of *Ram Prasad v. Binaek Shukul* (2) it was laid down by another Bench that where a debtor pays a certain amount in part satisfaction of what is due from him, without caring to specify that the sum is to be appropriated towards interest or principal, and the creditor appropriates such payment towards interest, the payment cannot be considered to be the payment of interest as such and will not save limitation on that footing, and further that the payment having been lawfully appropriated towards interest, it cannot be considered to be payment in part satisfaction of the principal and limitation cannot be saved on the supposition that a part payment of the principal was

(1) (1929) I L.R., 52 All., 459.

(2) (1933) I L.R., 55 All., 632.

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made and the fact of payment appears in the handwriting of the debtor. In the course of the judgment it was emphasised that where a debtor pays a certain sum of money to his creditor, there may be an implied acknowledgment of the liability to the extent of the amount paid; but it cannot be said that the remaining liability, by evidence *aliunde*, should be deemed to have also been acknowledged. This case was later followed by a member of the same Bench sitting singly in *Kirpa Ram v. Balak Ram* (1), but a single Judge decision in the case of *Rambohor Misir v. Chaturghun Rai* (2) may be considered to express a somewhat contrary view.

Now the law of limitation imposes certain arbitrary time limits on suits. There may not be any clear principle of equity underlying such restrictions, which are entirely a matter of policy, aiming at expedition and intended to prevent stale claims from being litigated. The interpretation of sections in such an enactment has to be made strictly according to the language employed, and not on a consideration of what ought to be the law. Of course, where the language is ambiguous and capable of two interpretations, the section should preferably be interpreted so as to mitigate the rigour of the bar.

It seems to me that the main principle is that there is a fresh start for purposes of limitation with a fresh cause of action. Innovation of contract always gives rise to a new cause of action with a fresh starting point of limitation. In England, acknowledgment of a debt is considered to imply a promise to pay. And as a past debt can form a valid consideration for a contract, an acknowledgment of the liability to pay a debt, with the implied promise to pay it, may be treated as a new contract so as to give a fresh start for limitation. But in India section 19 is rather restricted and the acknowledgment must be made before the expiry of the

(1) [1935] A.L.J., 23.

(2) [1935] A.L.J., 304.

period of limitation, and appears to be distinct from a definite promise to pay. Where there is an acknowledgment of liability to pay within the meaning of section 19, the time is computed afresh from such acknowledgment.

It seems to me that the principle underlying section 20 is also similar, but the legislature has laid down that in certain specified classes of cases there should be a conclusive presumption of an acknowledgment of liability to pay, with a consequent fresh start for limitation. Section 20, no doubt, is not professedly based on any such principle, but when its provisions are examined, this, to my mind, appears to be a legitimate inference.

Now it is noteworthy that two separate paragraphs have been allotted to payments of interest and part payment of principal respectively, and the words employed also are different. There is, *prima facie*, therefore, no reason to suppose that the legislature has intended that they should be exactly on the same footing. A mere payment of interest is useless to save limitation unless the interest has been paid (a) before the expiration of the period, (b) paid as such, and (c) by the person liable to pay the debt or by his duly authorised agent. The words "paid as such" necessarily imply that the interest must have been paid "as interest", which in its turn implies that it must have been paid as interest at the time of its payment. It is equally necessary that it must have been paid by the person liable to pay or his authorised agent. Thus something which is much more than a mere payment of money is required. It should be payment of interest professedly as interest, which means that at the time of making the payment the debtor should distinctly appropriate it towards interest and inform the creditor that he is doing so, so that the creditor thereafter may not have the option of appropriating it towards the principal. It is significant

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that the legislature is so particular. As a general rule all payments made by debtors go in the first instance towards the discharge of the interest, but the legislature has thought it fit that this general practice should not be enough, but in order to save limitation the creditor must prove that the interest was paid as interest.

Before 1927 it was not necessary that the payment of interest as interest should be evidenced by any writing. It was accordingly open to the creditor to prove *aliunde* that interest was paid as such although such payment did not appear in the handwriting of the person making the same. It consequently frequently led to disputes between the creditor and the debtor, the former in order to save limitation alleging that interest had been paid as such and the latter in order to claim protection pleading that no such payment had in fact been made. But as regards the part payment of principal, the section was specific and the proviso as it then stood insisted upon the fact of the part payment of the principal appearing in the handwriting of the person making the same.

Now if one examines the implications of these two provisions, it becomes at once obvious that they in a way implied an acknowledgment of a liability to pay a further amount that may be due. When interest is paid as interest, that is professedly as interest and not towards principal, then there is an indirect admission that there is some principal sum due on which the interest has accrued and that principal is not being paid but only interest thereon is being paid. The legislature has, therefore, provided that where interest is paid as interest, there should be a fresh start for limitation.

Similarly where a part payment of the principal sum is made, there is a necessary admission that the other part is still outstanding, which implies an acknowledgment of a liability to pay the outstanding balance, and so such part payment also gives a fresh start. But in

order to prevent disputes as to whether the payment of the principal was in part or whole, it was thought necessary that the fact of the payment should appear in the debtor's handwriting.

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It is equally obvious that where a payment is made without any specification and the debtor does not signify whether he is making the payment of interest as such or of part payment of the principal, there is really no admission on his part that any further sum is still due from him, and there is therefore no acknowledgment of liability on his part. He merely pays a lump sum of money and by no means admits that the debt is not fully discharged. There is an admission no doubt that there was a liability on him to the extent of the amount so paid, but there is no acknowledgment of any further liability. Similarly where the debtor offers a sum of money distinctly on the condition that he is making the payment in full discharge of his liability, it would be impossible to hold that there is an implied acknowledgment on his part of a liability to pay the balance if it is found due. In the first two classes of cases the legislature has allowed exemption from limitation, but has not considered it fit to make exemptions in the remaining classes of cases.

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It seems to me that when a payment is made by a debtor, it may fall under any one of the following categories:

(i) payment of interest as such by the debtor: In such an event the case would come under paragraph 1 of section 20.

(ii) payment of interest by the debtor but not payment as interest: For instance, a payment may be made by the debtor without specification, which entitles the creditor to appropriate the amount towards interest under section 61 of the Contract Act. In such an event the amount, if so appropriated, would become a payment of interest, but it would not be interest paid as interest by the debtor.



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(iii) payment of interest as such, but not by the debtor: For instance, a co-judgment-debtor may make a payment on behalf of all the judgment-debtors, although he is not their agent and is not authorised to act on their behalf. In such a case, so far as the other judgment-debtors are concerned, it would not be a payment by them, though the payment may well be of interest as interest; See *Ahsan-ullah v. Dakkhini Din* (1).

(iv) It may be a part payment of the principal: In which case it would fall under the second paragraph of section 20. For instance, where the debtor professedly pays the amount in partial discharge of the principal sum.

(v) It may professedly be the payment of the whole of the principal, when the offer is made by the debtor with the distinct condition that it is being paid in full discharge of the entire amount of the principal. In such a case, it would be difficult to hold that it was a part payment only, and there was an implied acknowledgment of the liability on the part of the debtor to pay the balance.

(vi) Or it may be paid without specification whatsoever, leaving the matter entirely at the option of the creditor to appropriate it either towards interest or towards principal. Accordingly (a) the creditor may appropriate the amount towards the interest, when it becomes a payment of interest, though not paid by the debtor as such, or (b) the creditor may appropriate it towards the principal, in which case it would become a part payment of the principal and not a payment of interest. The second paragraph does not use the words "as such" and therefore it does not seem necessary for part payment of principal that the payment should have been made by the debtor at the time of payment professedly as part payment of principal.

(1) (1905) I.L.R., 27 All., 575.

In my judgment section 20 refers to the payments in categories Nos. (i), (iv) and (vi)(b) only, and not to the rest. These three categories, though mutually exclusive, are not between them absolutely exhaustive, for there are cases which may fall under the other four categories and not fall under either of these three. I am, therefore, unable to hold that when a payment is made without any specification, it must either be a payment of interest as such by the debtor or it must be a part payment of the principal by the debtor. In my opinion, there are additional possibilities as well.

As an illustration I may cite the instance of a tenant sending an amount by money order to his landlord without mentioning that the amount is being paid towards the principal part of the rent due from him or towards the interest on such rent, while in point of fact both the amount of the principal and the amount of interest as claimed by the landlord are separately in excess of the amount sent by money order. Can it be seriously suggested that the tenant in sending this sum of money without any further admission was acknowledging his liability to pay a further balance which may be claimed by the landlord? The tenant indeed might well dispute that anything more than the amount sent is due, in which case it can hardly be said that he had made an admission against himself.

So far, therefore, as the substantive section stands, I see no difficulty whatsoever in interpreting it and I see no superfluity, inconsistency, anomaly or absurdity in its language. Payment of interest as such by the debtor and part payment of principal by the debtor are dealt with in the two separate paragraphs in a distinct manner and there is no ground for imagining that in spite of their being dealt with separately and in spite of the fact that different languages are employed in respect of them, they stand exactly on the same footing and there is no distinction whatsoever between them.

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I now come to a consideration of the effect of the amendment of 1927. The proviso in section 20 of the Acts of 1877 and 1908 was in the following terms: "Provided that, in the case of part payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same." In place thereof the following proviso has been substituted: "Provided that, save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment."

As I read the substituted proviso, the only difference which it has made is that the handwriting of the person making the payment is now necessary for both the payments mentioned in section 20, and not only for part payment of the principal as before. The legislature has apparently thought it fit to put a stop to the controversy between creditors and debtors as to whether any amount has in fact been paid or not. Without an acknowledgment in the handwriting of the debtor, the payment would not save limitation. Thus it is no longer open to a dishonest creditor falsely to admit payment of interest in order to save his claim from limitation. But this extension of the necessity to have a writing in case of both the payments does not, in any way, imply any radical change in the substantive section itself, which the legislature has left untouched. That section had stood in its original form for fifty years and had been interpreted in a certain way by the courts in India. There is absolutely no reason to alter the interpretation of that section merely because a written acknowledgment is now made necessary for payment of interest also. The legislature must be deemed to have been aware of the importance attached to the words "paid as such" in the first paragraph, and its deliberate act in not deleting those words should naturally be interpreted as implying that the interpretation put upon those words has been accepted by the legislature and adhered to.

I am altogether unable to see how this interpretation would make the section in any way absurd. As pointed out above, there are several categories of payment of money and only three of these come under section 20. It was, therefore, necessary to retain both the paragraphs in this section so that the particular categories which are considered to give exemption should be identified and not confused with the other categories which are independent of them. Had the legislature intended to make all payments of money, no matter of what kind and in what manner made, quite sufficient to save limitation, only if there was the handwriting, it would have been very easy to redraft the section and have one short paragraph to express such an intention. This course has not been adopted. The section has been retained as it stood before, and only the proviso has been amended. I am, therefore, unable to hold that the entire effect of the use of the words "paid as such" which pre-eminently occur in the opening paragraph is altogether null and void, that the words have become redundant and superfluous and that it is only due to a clumsy drafting that those words have been retained. I am bound to attribute to the legislature a clear appreciation of the interpretation of the law, as it stood at the time of the amendment, and its retention of those important words as a deliberate act in order to give effect to its real intention, which must be gathered from the language used and not by a mere speculation as to what the true intention ought to be.

Where there is no specification made by the debtor, the creditor is entitled under section 61 of the Contract Act to make the appropriation in any way he likes; and if the creditor chooses to appropriate the amount towards the payment of interest due, the payment cannot be considered to have been a payment of interest as such by the debtor. It would no doubt become a payment of interest after the appropriation, but not a payment of interest as interest by the debtor. It would certainly

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not be a part payment of the principal by the debtor as such; but if afterwards appropriated by the creditor towards the principal, it would become a part payment of the principal. As already pointed out the section does not require that part payment of the principal should be made by the debtor professedly as part payment of principal at the time. It follows that where the amount was paid without any specification and the creditor has, in fact, appropriated it towards principal, it would become a part payment of the principal.

I have, therefore, come to the conclusion that where money is paid by a debtor without specifying whether the payment is towards interest or towards principal, leaving it to the option of the creditor to appropriate it as he likes, and the creditor appropriates it towards interest, there is neither a payment of interest as such nor a part payment of the principal within the meaning of section 20, but there is a mere unspecified payment of money, which has subsequently by the act of the creditor become a payment of interest.

This is my interpretation of section 20 of the Limitation Act.

THOM, J.:—This application in revision arises out of a suit for recovery of a sum of Rs.250 on the basis of a bond dated the 7th of October, 1927. The suit has been dismissed on the ground that it is barred by time. The applicant, however, contends that the claim is not barred by time as the date from which the period of limitation should be held to begin to run is the 17th of August, 1930. On that date a sum of Rs.50 was paid and the bond bears an endorsement within the meaning of section 20 of the Limitation Act by the debtor that this sum was paid. In the endorsement, however, there is no indication as to whether this sum is paid towards interest which was due or in part repayment of principal.

The sum of Rs.50 is less than the amount of interest that was due upon the bond on the 17th of August,

1930, and it is less than the capital sum lent upon the bond. In these circumstances, in my judgment, the payment of Rs.50 should be regarded as a payment towards interest. When a debtor makes a payment without specifying whether the payment is towards interest or towards capital, then, in my view, it is only reasonable to infer that he intends the payment to be made towards interest. It is difficult to imagine a case where a debtor will make a payment and intend it to be appropriated towards the redemption of the capital sum when interest is due. The court in such circumstances, in my opinion, in the absence of any evidence to the contrary, is entitled to hold that the payment is a payment towards interest.

This view, however, is not in accord with the interpretation of section 20 of the Limitation Act as that section was interpreted by the courts in India prior to the amendment of the Limitation Statute in 1927.

Section 20 as amended is as follows: "Where interest on a debt or a legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorised in this behalf, or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made, provided that, save in the case of a payment of interest made before the 1st of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the same."

The amendment of the section took the form of the addition of the proviso which now appears at the end of the section quoted.

The view taken by the courts in India prior to the amendment of the statute was that by the words "as such" in the section the legislature intended to place

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the burden upon the creditor claiming on the footing of a bond of proving that when a payment of interest was alleged the debtor specifically appropriated the payment towards interest at the date of payment. No doubt this was a not unreasonable interpretation to place upon the words "as such", but it is permissible to doubt if such a construction was a correct one.

The opposite party contends that the words "as such" in the amended section should be given the same meaning as they were given by the courts in India prior to the amendment and he contends that, inasmuch as the claimant had failed to prove that the payment of Rs.50 was a payment towards the redemption of capital or was specifically appropriated to interest by the debtor, it cannot have the effect, in view of the terms of section 20, of starting a fresh period of limitation. In my view this argument is unsound.

It is true that the endorsement does not appropriate the payment of the Rs.50 either towards principal or interest, but it is a fact that the sum of Rs.50 is less than the amount of interest due or the amount of the principal sum. It clearly follows therefore that the payment must have been either towards interest or towards part payment of capital or towards both. I have already expressed my view that the payment should be regarded by the court as a payment towards interest. Be that as it may, there can be no disputing the fact that the payment was either towards interest or was part payment of capital, or partly towards interest and partly towards capital, and whichever be the case, a fresh period of limitation will begin to run from the date of payment. The opposite party contends, however, that as the claimant has failed to prove that when making the payment the debtor specifically appropriated the same towards interest, even though it has been appropriated towards interest by the creditor, it is not a payment of interest "as such" within the meaning of section 20 of the Limitation Act and therefore a fresh

period of limitation does not run from the date of payment.

The difficulty has arisen because of the expression "interest paid as such" in the section. The words "as such" appear to me to be redundant. A payment of interest is a payment of interest and it is no more a payment of interest if the words "as such" are added. A payment of interest cannot be payment of anything else and it is no more clear that it is a payment of interest if the words "as such" are added. Prior to the amendment of the statute, as already observed, however, a certain meaning was given to the words "as such" by the courts in India. I can see no reason, however, for giving the same meaning to these words, which are clearly redundant, in the amended section. If the contention of the opposite party be accepted then the following will be the position: (1) If a payment were made and specifically appropriated towards repayment of capital a fresh period of limitation will run from the date of payment. (2) If a payment were made and specifically appropriated towards interest a fresh period of limitation will run from the date of payment. (3) If a payment were made and no specific appropriation appears in the endorsement, then, though the payment *must* either be towards interest or towards capital, a fresh period of limitation will not begin to run from the date of payment.

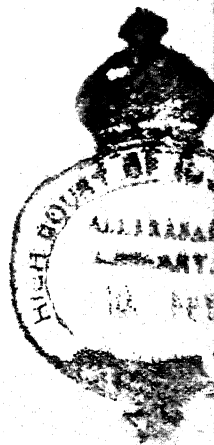
In my view an interpretation which leads to so absurd a result should not be accepted by the court. It should not be assumed that the legislature intended to pass an enactment which would lead to such an absurd result.

In my view the intention of the legislature was perfectly plain, viz., to put payment towards interest and part payment of capital on exactly the same footing. If the creditor could prove by an endorsement in the handwriting of the debtor a payment either towards capital or interest, then from the date of that payment, the intention of the legislature was, a fresh period of

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limitation should run. It follows, therefore, if this view be sound, that where an endorsement appears on the back of a bond in the handwriting of a debtor or his agent of the payment of a certain sum which is less than the amount of interest due, and less than the capital amount of the bond, a fresh period of limitation would run from the date of payment inasmuch as clearly the payment *must* be either towards interest or in part payment of principal, or partly towards interest and partly towards capital.

It is contended, on the other hand, however, that this interpretation would have the effect of reading out of the section the words "as such". This may be so, but it is permissible to read out words which are redundant or which lead to an absurd result and to refuse to give them an interpretation which would have the result of defeating the plain intention of the statute. Clearly in the present case if the words "as such" are given the meaning which was attributed to them by the courts prior to the amendment of the Limitation Act then the plain intention of the section is defeated and, as already observed, an absurd position results. It may have been necessary, prior to the amendment of the section, to give the words "as such" a certain meaning in order to make the section intelligible. That, in my view, however, is no reason for giving the same meaning to the words in the amended section if thereby the intention of the legislature is defeated or a palpable absurdity results.

The opposite party relies strongly upon the general principle with regard to the interpretation of statutes, that full meaning must be given to every word of the statute. True it is that it is the duty of the court to do full justice to each and every word appearing in a statutory enactment. The court, however, should not shut its eyes to the facts. It is common knowledge that draftsmen are sometimes careless and slovenly and that their draftsmanship results in an enactment which is

unintelligible or, if intelligible, is absurd. Where this is so, there is no reason why the court should diligently endeavour to spell out a meaning where there is no meaning or to solemnly affirm that the legislature deliberately placed imprimatur on an absurd enactment. No doubt, generally, full justice must be done to the words of a statutory enactment, but if the result of that is to do less than justice to the intelligence of the legislature it is the duty of the court to ignore the words which have the effect of making the enactment an absurd one. This view of the law is well founded on authority. Maxwell on Statutes, seventh edition, deals with the question of the modification of the language of a statute to meet the intention of the legislature. The learned author states at page 198: "Where the language of a statute in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, by altering their collocation, by *rejecting them altogether*, or by interpolating other words, under the influence, no doubt, of an irresistible conviction that the legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used."

In the case of *Rex v. Vasey* (1) the question of modification of the words of a statute was considered. In the

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course of his judgment LORD ALVERSTONE, C.J., approves of the passage from Maxwell's Interpretation of Statutes quoted above and proceeds with regard to the special circumstances of that particular case: "This case is a good instance of the principle that the manifest intention of a statute must not be defeated by too literal an adhesion to its precise language. . . . The object of the amendment is plain and I think it is a case in which we must apply the principle I have cited, and so construe the section as to make it carry out that undoubted object." In that case the court decided to ignore certain words which appeared in the section under consideration and WILLS, J., in the course of his judgment states: "Nobody, I think, who considers the enactments in question as a whole, can doubt that such was the intention of the amending section, and, if so, something must be cast aside in order to make sense of the earlier section as amended. It matters little which words go, so long as the obvious meaning is preserved."

A similar question was considered in the case of *Rex v. Ettridge* (1). The judgment of the Court, which consisted of DARLING, WALTON and PICKFORD, JJ., was delivered by DARLING, J., and in the course of his judgment the principle, that to give sense to an enactment it is the duty of the court to ignore certain words of the enactment, is specifically approved. At page 28 of the report the learned Judge states: "We are of opinion that we may in reading this statute reject words, transpose them, or even imply words, if this be necessary to give effect to the intention and meaning of the legislature; and this is to be ascertained from a careful consideration of the entire statute."

In the case of *Salmon v. Duncombe* (2) the principle was approved that where the main object and intention of a statute are clear it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of law,

(1) [1909] 2 K.B., 24.

(2) (1886) 11 App. Cas., 627.

except in a case of necessity or the absolute intractability of the language used.

Now there can be no doubt whatever that section 20 of the Limitation Act as amended is a typical example of sloppy draftsmanship, and applying the principle approved in the decisions referred to above, it is in my judgment permissible to attach no meaning whatever to the words "as such". In my view, in any case, the words "as such" are clearly redundant. Be that as it may, in the circumstances the court ought to attach no significance to them. The court ought to ignore them entirely in order not only to avoid an absurdity but to give effect to the plain intention of the legislature.

It may be observed that apart altogether from the absurdity of the position which would result from interpreting the words "as such" as these words were interpreted prior to the amendment of section 20, such an interpretation would, for all practical purposes, render the section nugatory. In ninety-nine cases out of a hundred when a debtor makes a payment and endorses the same on the back of the bond he does not appropriate the payment either to interest or to principal. But if he makes no appropriation then according to the contention of the opposite party, a fresh period of limitation will not run from the date of payment. Such a result, it is clear, was not intended by the legislature.

It was contended by the applicant that the endorsement of the payment on the bond by the debtor amounted to an acknowledgment of liability within the meaning of section 19 of the Limitation Act. For the reasons given by the learned CHIEF JUSTICE, I agree that this contention is unsound.

In the result I would hold that since the endorsement of the payment of Rs.50 on the back of the bond in suit indicates a payment made on the 17th of August, 1930, either towards interest or in part repayment of principal or partly towards interest and partly towards

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capital, a fresh period of limitation began to run from that date and the suit is not barred by limitation.

NIAMAT-ULLAH, J.:—I adhere to the view expressed by me in *Ram Prasad v. Binaek Shukul* (1) and in *Kirpa Ram v. Balak Ram* (2), and concur with the CHIEF JUSTICE in the answer which he proposes to give to the question referred to the Full Bench.

RACHHPAL SINGH, J.:—The question for determination in these two cases is whether on the proved facts of the two cases the plaintiffs are entitled to the benefit of the provisions of section 20 of the Indian Limitation Act.

In revision No. 219 of 1934 the facts were these. The plaintiff instituted a suit against the defendant to recover a sum of money on foot of a bond dated the 7th of October, 1927. The suit was instituted on the 17th of August, 1933. In the plaint it was stated that on the 17th of August, 1930, the defendant had paid a sum of Rs.50 towards interest, and therefore the plaintiff alleged that his suit was within limitation. It may here be stated that the payment was noted on the reverse of the bond and bore the thumb-impression of the defendant. The trial court held that it was proved that on the 17th of August, 1930, the defendant had paid a sum of Rs.50. No evidence was produced to show whether this payment had been made towards interest or principal. It appears that it was a general payment made by the defendant without specifying whether it was made towards interest or principal.

In revision No. 408 of 1934 the facts were very similar.

In both the cases the trial court dismissed the claim as barred by limitation. In both the cases the plea of limitation was successful because the trial courts felt compelled to decide the issue of limitation against the plaintiffs in view of the ruling of this Court in *Ram Prasad v. Binaek Shukul* (1).

(1) (1933) I.L.R., 55 All., 632.

(2) [1935] A.L.J., 23.

It may here be stated that in revision No. 219 of 1934 on behalf of the defendant the argument was that as the sum of Rs.50 was a general payment and was not proved to have been paid as interest, the plaintiff was not entitled to a fresh period of limitation under the provisions of section 20 of the Indian Limitation Act. The plaintiff finding himself in this difficulty made an attempt to amend his plaint and to say that the payment of Rs.50 had been made towards part payment of the principal sum secured under the bond. This amendment, however, was not allowed by the trial court.

Before Act No. I of 1927 was passed section 20 of the Indian Limitation Act ran as follows: "Where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorised in this behalf, or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made: provided that, in the case of part payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same."

The position was this: If a debtor paid interest as such, then a fresh period of limitation was available to the creditor from the date on which interest was paid. It was not necessary that there should be an acknowledgment in writing by the debtor. The debtor could make a payment without the transaction being reduced to writing and it was open to the creditor to prove that as a sum of money had been paid towards interest a fresh period of limitation should be computed from the date of that payment. On the other hand if a payment was made towards part payment of the principal, then before it could be taken advantage of by the creditor it was necessary that there should be an acknowledgment in the handwriting of the debtor.

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Some curious results followed. It was always open to a dishonest creditor whose suit had become barred by limitation to set up a false payment of interest in order to bring his case within limitation. All that was necessary for him to do was to produce some evidence to show that a small sum had been paid by the debtor as interest. Then there were cases in which the debtor had made a general payment without specifying whether the payment was made towards interest or principal. In view of the provisions of section 20, as it stood before the passing of Act No. I of 1927, the creditor in case of a general payment could not say, where the payment was not noted down in writing, that it had been made towards principal. The proviso to section 20 that "In the case of part payment of principal of a debt, the fact of the payment appears in the handwriting of the person making the same" stood in his way. So it was always to his interest in case of a general payment to plead that it had been made towards interest. The courts insisted that whenever a payment was pleaded by the creditor for the purpose of bringing his claim within limitation he had to prove not only that a sum was paid to him but he was further required to establish that the amount paid was paid towards interest as such. If he failed to prove that the payment was made towards interest as such then the court held that the limitation was not saved. In cases of payment made on general account constant disputes arose between the creditors and the debtors. The creditors always wished to prove that the payment which had been made was towards interest as such. By doing so they could get a fresh start of limitation. On the other hand the debtors who wanted to defeat the claims of the creditors by pleading the bar of limitation always wished to prove that the payment had been made towards principal but nevertheless the suit was not within limitation because no acknowledgment in writing had been made. It was in order to set at rest this fruitful source to litigation that the legislature intervened

and Act No. I of 1927 amending section 20 of the Indian Limitation Act was enacted and came into force from the 1st of January, 1928.

The amended section 20 of the Indian Limitation Act runs as follows: "Where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorised in this behalf,

or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorised in this behalf,

a fresh period of limitation shall be computed from the time when the payment was made:

Provided that, save in the case of a payment of interest made before the 1st of January, 1928, an acknowledgment appears in the handwriting of or in a writing signed by the person making it."

The question which has to be considered is, what change has been made in the provisions of section 20 of the Indian Limitation Act after the passing of the amending Act No. I of 1927. In my opinion the only change that has been made is that after the amendment, payment of interest in order to save limitation must also be in the handwriting of, or in a writing signed by, the person making the payment. Before the amendment only part payment of the principal in order to give fresh start of limitation had to be in the handwriting of the debtor. Now the same rule is made applicable in cases of payment of interest also. That is the only result of the amendment. In other respects the position is in no way altered.

The first part of section 20 after the amending Act No. I of 1927 stands exactly word for word as it stood before the amendment. As already explained the only change made is that under the old section it was not necessary that payment of interest should be in the handwriting of, or in a writing signed by, the person making it, while now it is necessary.

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The first point for consideration is whether now a general payment without any specification by the debtor would save limitation if the creditor makes an appropriation of payment towards the payment of interest. Before the amending Act No. I of 1927 was passed the view taken in a large number of ruling cases was that a payment towards general account made by a debtor without specifying whether such payment was to be appropriated in satisfaction of interest due from him was no payment of interest as such. It is not necessary to cite all the rulings in which this view was expressed, but I may be permitted to mention a few of them. In *Muhammad Abdulla Khan v. Bank Instalment Co.* (1) a Bench of two learned Judges of this Court held that under section 20 of the Limitation Act the payment of interest will save limitation when the payment is made as such, that is to say, that the debtor has paid the amount with the intention that it should be paid towards interest and there must be something to indicate that intention, and the mere appropriation by the creditor of these payments to interest is not such an indication. I am aware of no case of this Court in which a contrary view may have been expressed.

*Hanmantmal Motichand v. Ramba Bai* (2) was a case in which a debtor had at different times made payments to the plaintiff in reduction of the general balance of account against him, but without intimating that any of such payments was to be appropriated in satisfaction of the interest due on his debt. The Bombay High Court held that there had been no payment of interest "as such" by the defendant so as to bring the case within clause (1) of section 21 of the Limitation Act (Act IX of 1871) and that the claim was barred. *Subraya Kamati v. Pakaya* (3) was a case in which at the time of making the payment the debtor had made an endorsement saying that he was paying Rs.4 out of the entire amount payable

(1) (1909) I.L.R., 31 All., 495.

(2) (1879) I.L.R., 3 Bom., 198.

(3) (1902) 4 Bom. L.R., 231.

on account of principal and interest in respect of this bond. The court, therefore, held that there was a payment of interest as such which saved limitation. That case is not applicable to the case before us, for the simple reason that here there is no indication that the debtor expressed an intention that he was paying money in payment of interest. The next Bombay case is *Damodar Ramchander v. Jankibai* (1). The learned Judge who decided this case held that where payments were made towards the satisfaction of a debt and there was nothing to show whether they were made in respect of principal, or interest, or both, or indefinitely on general account, they could not serve to extend the time under section 20 of the Limitation Act, unless it was established clearly in some way that payments were made on account of interest as such. The ruling in the case of *Subraya Kamati v. Pakaya* (2), referred to above, was distinguished on the ground that in that case the court below had found as a matter of fact that the payment was for principal and interest. The next Bombay case on the point is *Ranchordas Tribhowandas v. Pestonji Jehangir* (3). It was remarked that "Principal must always be paid as principal, but the fact of the payment must appear in the handwriting of the person making the same, i.e., of the debtor or his duly authorised agent; consequently, if a lump sum be paid by a debtor to his creditor, and no intimation be given as to how it is to be appropriated, and no memorandum be made by the payer of its payment, it cannot be treated as part payment of principal, because of the want both of appropriation and of a memorandum, and it cannot be treated as part payment of interest because it was not paid as such."

The Calcutta High Court in *Bitari Ram v. Kunji Singh* (4) held that a creditor cannot claim the benefit of section 20 of the Limitation Act unless he can show that the payment was made on account of interest as such;

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(1) (1903) 5 Bom. L.R., 350.

(3) (1907) 9 Bom. L.R., 1329.

(2) (1902) 4 Bom. L.R., 231.

(4) (1913) 20 Indian Cases, 857.

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there must be either some express declaration by the debtor, or there must be circumstances from which such an intention on the part of the debtor may be inferred. Another Calcutta case on the point is *Charu Chandra v. Karam Buxa Sikdar* (1). It was held that the expression "as such" in section 20 of the Limitation Act implies that something more than mere payment of interest must be established to entitle the creditor to the benefit of that section. At page 814 the following observations were approved: "The section requires something more than the English law does, namely that interest must be paid as interest, that is, it must be distinctly stated at the time of payment that it is paid on account of interest, or else there must be evidence from which the payment as interest may be distinctly inferred, and if so, the mere proof of payment is sufficient."

In *Muin-ud-din v. Muhammad Ahmad* (2) SHADI LAL and LESLIE JONES, JJ., held in a Punjab case that "Payments made by the debtor in reduction of the general balance of account against him, but without intimating that any of such payments was to be appropriated in satisfaction of the interest due on his debt, do not amount to a payment of interest as such to save the bar of limitation."

The same view was taken in a Nagpur case *Jago v. Mahadeo* (3), in an Oudh case *Lalji v. Ghasi Ram* (4), and in a Burma case *Nga Twe v. Nga Ba* (5). A contrary view appears to have been expressed in *Soumia Narayana Iyengar v. Alagirisawmy Iyengar* (6) by a Bench of the Madras High Court.

It appears to me that the preponderance of authority is in favour of the view which has prevailed in this Court and which is expressed in the case of *Muhammad Abdulla Khan v. Bank Instalment Co.* (7). It will thus be seen that there is ample authority in favour of the

(1) (1917) 43 Indian Cases, 812.

(3) (1920) 59 Indian Cases, 709.

(5) (1915) 31 Indian Cases, 101.

(2) (1915) 31 Indian Cases, 782.

(4) A.I.R., 1930 Oudh, 287.

(6) (1912) 14 Indian Cases, 580.

(7) (1909) I.L.R., 31 All., 495.

proposition that before the amending Act No. I of 1927 a general payment, without specifying that it was made on account of interest as such, did not save limitation. The amending Act No. I of 1927 has made no change in the first part of section 20. When a creditor wants to bring his case within the provisions of section 20 he has to show not only that a payment was made but has further to establish that the payment was made of interest as such. Before the amending Act he could prove the payment of interest as such without showing any writing signed by his debtor whereas now he is required to show that the payment was signed by his debtor. In the cases before us all that the creditors have been able to establish is that payments which are endorsed by the debtors on their bonds have been made. In other words the creditors have proved general payments. In my opinion they cannot be deemed to be payments of interest as such which would save limitation.

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It was argued before us that as the debtors had not made appropriation and as the creditors appropriated the payments towards interest it should be deemed that they were made towards payment of interest. I do not think that a general payment without specification by the debtor that it was being made towards interest as such would attract the consequences of section 20 of the Limitation Act. The ruling of this Court in *Muhammad Abdulla Khan v. Bank Instalment Co.* (1) is against the contention of the applicant. In that case it was held that merely the appropriation by the creditor of payments to interest is not an indication that the payment was made towards interest as such. The same view was expressed in *Mahamad Kamel v. Ahmad Ali* (2) by two learned Judges of the Calcutta High Court. It was held that under section 20 of the Limitation Act payment towards interest must be deemed as such, that is, it must expressly be towards interest, and that it has nothing to do with the general right of the creditor of appropriation

(1) (1909) I.L.R., 31 All., 495.

(2) (1925) 87 Indian Cases, 745.

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of money either towards interest or towards principal. The question of appropriation has nothing to do with the question of rule of limitation enacted by section 20 of the Indian Limitation Act. Where a debtor makes a general payment without specifying whether he is making it towards interest or principal, it is the absolute right of the creditor to make an appropriation. All that this means is that it is open to him to accept the payment either towards part payment of interest or towards part payment of principal. But that has nothing to do with the question of limitation. By crediting the payment towards part payment of interest the creditor would not be entitled to claim a fresh period of limitation because the payment has not been made towards interest as such and therefore would not come within the terms of section 20 of the Indian Limitation Act.

The next question which has to be considered is whether in the case of a general payment without any specification by the debtor a creditor can say that the payment should be treated as having been made towards part payment of the principal, which would entitle him to claim a fresh period of limitation from the date of payment in view of the second clause of section 20 of the Indian Limitation Act, as it stands now. In my opinion the applicants cannot be permitted to do so. In *Venkatadri Appa Rao v. Parthasarathi Appa Rao* (1) their Lordships of the Privy Council made the following observations which are to be found at page 573 of the report: "The question then remains as to how, apart from any specific appropriation, these sums ought to be dealt with. There is a debt due that carries interest. There are moneys that are received without a definite appropriation on the one side or on the other, and the rule which is well established in ordinary cases is that in those circumstances the money is first applied in payment of interest and then, when that is satisfied, in

(1) (1921) I.L.R. 44 Mad., 570.

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payment of the capital. That rule is referred to by Lord Justice RIGBY in the case of *Parr's Banking Co. v. Yates* (1) in these words: "The defendant's counsel relied on the old rule that does no doubt apply to many cases, namely that where both principal and interest are due, the sums paid on account must be applied first to interest. That rule, where it is applicable, is only common justice. To apply the sums paid to principal where interest has accrued upon the debt, and is not paid, would be depriving the creditor of the benefit to which he is entitled under his contract.'" In the case before us large sums of money were due at the time of the payments on account of interest, so it cannot be said that the debtors could possibly have intended that the payments should go towards the part payment of principal. There can be no doubt that the payments were made towards the reduction of interest and not towards payment of principal. The question whether such payments of interest would attract the benefit of section 20 of the Limitation Act, however, stands on a different footing. Mere payment towards interest does not attract the provisions of section 20. If a man goes and makes a payment to his creditor and says that he is making it towards interest the creditor would not, on account of such payment, be entitled to claim the benefit of section 20. The reason is that before any advantage can be claimed under section 20 certain formalities have to be observed. One is that the payment of interest should bear the signature of the debtor or his agent, and the other is that there must be something to indicate that payment was made on account of interest as such. If these formalities are not observed then the first part of section 20 cannot come to the aid of the creditor. Nor can the creditor ask the court that on failure of his proving that the payment was made towards interest as such, it should be treated as having been made towards part payment of the principal. The case might have

(1) [1898] 2 Q.B., 460(466).

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stood on a different footing altogether if at the time of payment the entire sum paid could not possibly have gone towards the payment of interest only. Take the following case as an instance: On the date of payment Rs.50 are due on a bond on account of principal and Rs.2 on account of interest. The debtor makes the payment of Rs.20. In that case the creditor would be right in saying that only Rs.2 had been paid towards interest and the balance must be deemed to have been paid towards part payment of the principal. To such a case the provisions of the second part of section 20 would be clearly applicable. The payment of interest might not enlarge the period of limitation because it was not paid as such, but the payment of the balance would certainly be one towards part payment of the principal and if the endorsement about it is signed by the debtor or his agent then it will certainly enlarge the period of limitation. But where the sum due on account of interest is much larger than the amount paid, then in my opinion it will be wrong to say that as the payment cannot be treated as having been paid in payment of interest as such, it might be treated as having been made towards part payment of the principal.

*Curlender v. Abdul Hamid* (1) was cited on behalf of the applicants. What was laid down in that ruling was that it was not necessary that the writing referred to in section 20 of the Indian Limitation Act, 1908, must itself show that the payment made was made as part payment of the principal sum due, as it may be obvious from the fact that no interest was due at the time of making the payment that it could only have been made in part payment of the principal. This ruling would be applicable to those cases where it appears that on the date of payment the whole sum which was paid could not possibly have been intended to be paid only towards interest. I have given an instance of a case of that description above. But the rule laid down in that

(1) (1920) I.L.R., 43 All., 216.

case would have no application to cases where it appears that on the date of the payment a larger sum than the amount paid was due on account of the interest. Another ruling relied upon by the applicant was *M. B. Singh and Co. v. Sircar and Co.* (1). In that case the learned Judges held that if the payment could not be proved to have been made towards interest as such then it must be treated as a payment towards principal. With great respect to the learned Judges who decided this case I find myself unable to agree with this view. It does not appear that the ruling of their Lordships of the Privy Council in the case of *Venkatadri Appa Rao v. Parthasarathi Appa Rao* (2) was brought to the notice of the learned Judges. Nor does the case show whether at the time of the payment the interest due was more or less than the amount paid. If at the time of each payment the entire interest then due was wiped off and there remained a balance, then certainly it can be said that the balance went in part payment of the principal and thus limitation was saved. On the other hand if interest due on the date of each payment was more than the amount actually paid, then it cannot possibly be argued that any portion of the payment made went towards the part payment of the principal. In the case of *Hem Chandra Biswas v. Purna Chandra Mukherji* (3) there are certainly observations which support the contention of the applicants before us. At page 571 the learned Judges made the following observations: "The learned Judge said 'If I am wrong in the conclusion that I have arrived at as to the payment being a payment of interest as such, then the payment being proved and there being admittedly a document in the handwriting of the defendant from which the fact of the payment appears, the payment must be taken to be a payment on account of principal.' That view I think is right. In none of the cases where a different view has been taken, was there a document in writing to satisfy

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(1) (1929) I.L.R., 52 All., 459.

(2) (1921) I.L.R., 44 Mad., 579.

(3) (1916) I.L.R., 44 Cal., 567.



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the second part of section 20 of the Limitation Act. In this case there is a distinct finding by both the courts below as regards the payment. If the Judge was right that the evidence did not establish that the payment was made on account of interest as such, still there was evidence establishing the payment plus the document in writing proving the fact of payment. On that evidence, the learned Judge was entitled to come to the conclusion that the payment was a part payment on account of principal." With utmost respect I find myself unable to agree with the view expressed in these observations. A perusal of the case shows that the learned Judges held that there was a finding of fact by both the courts below that the payment had been made towards part payment of principal and was in the handwriting of the debtor and therefore they held that section 20 was applicable. As I have already remarked, I fail to see how it can be possibly argued that a part payment towards principal was made when a much larger amount than the sum paid was due on account of interest.

For the reasons given above I am clearly of opinion that where a general payment without any specification is made by a debtor and at the time of payment a larger sum than the amount paid is due on account of interest, then the creditor cannot be heard to say that it was a payment towards the part payment of the principal, which would give him a fresh period of limitation under section 20 of the Indian Limitation Act. On the other hand if in a case it is found that at the time of general payment without specification the entire interest was wiped off and there remained a balance, then in that case a creditor would be entitled to a fresh period of limitation under section 20, because a part of the payment undoubtedly went towards the part payment of the principal.

In the case of *Ram Prasad v. Binaek Shukul* (1), which was a case decided by my learned brother NIAMAT-ULLAH,

(1) (1933) I.L.R., 55 All., 632.

J., and myself, the view taken was that where a debtor pays a certain amount in part satisfaction of what is due from him without caring to specify that the sum is to be appropriated towards interest or principal, and the creditor appropriates such payment towards interest, the payment cannot be considered to be the payment of interest as such and will not save limitation. It was also held that the payment having been lawfully appropriated towards interest it cannot be considered to be payment in part satisfaction of the principal, and limitation cannot be saved on the supposition that a part of principal was paid and the fact of payment appears in the handwriting of the debtor. I adhere to the view taken in this case.

I may be permitted to point out that the same view was taken by NIAMAT-ULLAH, J., in the case of *Kirpa Ram v. Balak Ram* (1).

It has been suggested that after the passing of Act No. I of 1927 the words "as such" have lost their importance. I find myself unable to agree with this contention. These words are there, and there appears to be no justification for holding that they have ceased to be of any importance. I find myself unable to share the view that there is any absurdity in this section as it stands now. The law of limitation is always arbitrary and the question as to whether or not the rule of limitation laid down in a particular section is inequitable is a point with which the courts have no concern whatsoever. The duty of the court is to interpret the section as it stands. If there is any inequity then the remedy lies in the hands of the legislature. If the legislature had intended to enact a rule that a general payment without specification would save limitation then it could have easily expressed its intention by enacting a rule to this effect. All that the legislature had to say was that a

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payment made by a debtor would give a fresh period of limitation to the creditor from the date of the payment. Before Act No. I of 1927 was passed the legislature were aware that courts had held, in a large number of ruling cases, that so far as payments towards interest were concerned limitation could only be saved if it was proved that the debtor made payment of interest as such. But we find that the legislature did not consider it fit to change the wordings of this section. We would, therefore, be justified in holding that the intention of the legislature was that the distinction between general payments and payments of interest as such should continue. As I have already mentioned, the only change made was that when a payment was made towards interest, then, like part payment of principal, it had to be in writing bearing the signature of the debtor or his agent.

For the reasons given above I hold that in the two cases before us there was no payment of interest as such. Nor was there any payment of a part of the principal. A creditor who has appropriated a payment towards interest cannot get a fresh period of limitation by saying that the general payment without specification may be treated as part payment of principal, when on the date on which the payment was made a larger sum than the amount paid was due to him on account of interest. I would, therefore, hold that the plaintiffs applicants are not entitled to claim a fresh period of limitation from the dates on which general payments without specification were made to them.

BAJPAI, J.:—This case has been referred to a Full Bench, because there is some conflict of opinion as to the true meaning and scope of section 20 of the Limitation Act, more especially after the amendment in the proviso by Act I of 1927. The facts may be briefly stated. The plaintiff brought a suit for the recovery of a sum of Rs.250 on the allegation that the defendant No. 1, Ewaz, and Nanhe deceased borrowed Rs.100 from

the plaintiff and executed a bond which provided for payment of interest at the rate of Rs.3-2-0 per cent per mensem, the interest to be compounded every six months. The bond was payable on demand. Defendant No. 1 and Nanhe deceased paid Rs.50 on the 17th of August, 1930, towards interest and both of them put their thumb-marks on an endorsement of payment at the back of the bond. The endorsement runs as follows: "Deposited Rs.50 today on the 17th of August, 1930." There is then an account at the foot of the plaint which says, "Principal was Rs.100 and interest from the 7th of October, 1927, to the 16th of August, 1933, at the rate of 2 per cent per mensem compoundable six monthly was Rs.250, out of which Rs.50 were paid and endorsed at the back of the bond and Rs.40 were remitted. The interest, therefore, due was Rs.150 and this with principal amounted to Rs.250." Ewaz, defendant No. 1, did not file any written statement but the heirs of the deceased Nanhe pleaded that the bond was without consideration and that its execution was not admitted. Nanhe the deceased had no necessity to borrow nor did he as a matter of fact borrow anything on the bond in suit. All the allegations of the plaintiff were wrong and the interest was exorbitant. The learned small cause court Judge referred to the evidence of the plaintiff and his witness Radha Ballabh and observed that they had said that Rs.50 were paid towards the bond but neither of them said as to whether this payment was made towards the principal amount or towards interest. Relying on the authority of *Ram Prasad v. Binaek Shukul* (1) the court below held that the suit was barred by time. It also held that the execution of the bond by defendant No. 1 and Nanhe deceased for consideration was proved. On the question of interest the learned Judge held that the interest claimed was not excessive in view of the fact that the plaintiff did not claim at the contractual rate but at the lower rate of 2 per cent per mensem and had further

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remitted a sum of Rs.40. In the event the suit was dismissed, and in revision before us it is contended that the view of the court below that the plaintiff's suit was barred by time is not sound.

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It is to be noticed that the plaintiff in his plaint distinctly said that the executants of the bond made the payment of Rs.50 *on the head of interest as such*. One may say that the plaint might be read as meaning that the plaintiff also credited it as such, but it is not possible to argue that the plaintiff appropriated it as interest irrespective of the volition of the debtors. Paragraph 2 specifically says that defendant No. 1 and Nanhe deceased paid Rs.50 as interest; it does not say that they paid Rs.50 on account and the plaintiff in pursuance of the right conferred on him by law appropriated it towards interest. The admission made by the plaintiff can be construed only in one light and as a single admission, namely that the sum of Rs.50 was *paid by the debtors towards interest as such* and it was therefore appropriated as such and hence the account in the plaint was calculated in the way in which it was done. It is possible to reject the entire admission and to say that the amount *was not paid towards interest as such*, but it is not permissible to hold that the plaintiff's case that the debtors paid the amount towards interest as such is wrong and to pin down the plaintiff to the implied admission in the plaint that he appropriated the amount towards interest. In the case of *Motabhoy Mulla Essabhoy v. Mulji Haridas* (1) their Lordships of the Privy Council say, "It is permissible for a tribunal to accept part and reject the rest of any witness's testimony. But an admission in pleading cannot be so dissected, and if it is made subject to a condition it must either be accepted subject to the condition or not accepted at all."

The learned Judge of the small cause court while considering this aspect of the case says, "It means that Rs.50 were paid by the debtors and they did not care to

(1) (1915) I.L.R., 39 Bom., 399 (409).

specify that the sum is to be appropriated towards interest or principal", and then following *Ram Prasad's* case (1) held that the suit was barred by time. I can only interpret this observation of the learned Judge as meaning that he accepts the fact that Rs.50 were paid but he rejects the case put forward by the plaintiff, viz., that the amount was paid towards interest as such, and that being so, the question arises as to the nature of this payment. I have said already that it cannot be payment of interest as such.

A debt consists of two portions, namely interest and principal, and this amount must, therefore, be taken as part payment of principal. It might be contended that such a finding would be opposed to the case put forward by the plaintiff, because the exemption from limitation was sought on the ground that a portion of interest was *paid as such* and the plaintiff should not be permitted to say that the suit is saved from limitation by reason of a part payment of principal. Under order VII, rule 6 where a suit is instituted after the expiration of the period prescribed by the law of limitation the plaintiff shall show the ground upon which exemption from such law is claimed. Upon a liberal construction of the plaintiff it must be deemed that the exemption was sought generally under section 20 of the Limitation Act. Courts are bound to apply the law of limitation in suits whether it is pleaded or not and to dismiss a suit which is apparently beyond time. Conversely they are bound not to dismiss, as barred, a suit which, on the face of it, is not barred. In the case of *Hingu Miah v. Heramba Chandra Chakrabarti* (2) MOOKERJEE, J., went further and said: "If the plaintiff shows the ground of exemption, the requirement of the Code is satisfied, but this does not preclude the plaintiff from taking another and an inconsistent ground to get over the bar of limitation if he believes that the latter is the true ground. Consequently in the case before us the plaintiff respondent is entitled to urge that

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(1) (193. I.L.R., 55 All., 632.

(2) (1910) 13 C.L.J., 139(147).

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the suit is not barred by limitation for a reason different from the one assigned in the plaint." In the case of *Parmeshri Das v. Fakiria* (1) it was held that "the plaintiff having mentioned one ground of exemption in the plaint was not debarred by the provisions of order VII, rule 6 of the Code of Civil Procedure from taking another and an inconsistent ground to get over the bar of limitation and could consequently rely upon the acknowledgment made in the pleas of the previous case". In the present case the plaint does state the ground upon which exemption from the law of limitation was sought and as such the requirements of order VII, rule 6 were satisfied, but if the case set up in the plaint is not proved but certain other facts are established then the plaintiff is entitled to exemption on those other proved facts. In the cases of *Abdul Ghani v. Mst. Babni* (2) and *Balmakund v. Dalu* (3) the plaintiff was allowed to succeed on a case different from the one which he had set up, when the proved facts entitled him to a decree. The test to my mind is that justice should not be allowed to be defeated simply because a party has not been able to prove the case which he attempted to prove but has proved certain other facts which nevertheless entitle him to a decree, provided the aggrieved party is not taken by surprise, and I cannot see any prejudice to the defendant in this case by allowing the plaintiff to allege that the payment of Rs.50 should be considered as payment of a part of the principal.

It is not the defendants' case that the sum of Rs.50 represented the entire liability of the executants which was wiped off by the payment of Rs.50; they in fact deny the taking of the debt. The debtors endorsed the payment on the back of the bond and allowed the bond to remain in the possession of the creditor, thus showing that the liability was not completely wiped off. The debtors might be illiterate, but this amount of intelligence must be attributed to them that a document evidencing

(1) (1920) I.L.R., 2 Lah., 13.

(2) (1902) I.L.R., 25 All., 256.

(3) (1903) I.L.R., 25 All., 498.

liability should not be allowed to remain in the possession of the creditor when the liability was extinguished, and there was no point in making any endorsement at the back of the bond. The payment must, therefore, be taken as the payment of a part of the principal.

As the acknowledgment of payment appears in a writing signed by the person making the payment the suit would be within time. Under section 3(52) of the General Clauses Act, "sign", with its grammatical variations and cognate expressions, shall, with reference to a person who is unable to write his name, include "mark" with its grammatical variations and cognate expressions. I might mention that before the Amendment Act of 1927 the proviso in section 20 of the Limitation Act ran as follows: "In the case of part payment of the principal of a debt the fact of the payment appears in the handwriting of the person making the same", and it was held in some cases that where the endorsement of a part payment of principal was in the handwriting of a person other than the debtor but it was signed by the debtor there was not a sufficient compliance with the proviso, but after the passing of the Amendment Act of 1927, where the language has been slightly altered and the words are "in the handwriting of, or in a writing signed by, the person making payment", it will be sufficient if the writing is merely signed by the debtor although it is written by another person.

I now propose to consider the importance of the words "as such" in the first paragraph of section 20 and of the proviso added by the Amendment Act of 1927. It is said that the words "as such" must be given some meaning and the meaning that was given to them by almost all the High Courts in India was that where payment is not expressed to be made on account of interest or on account of principal and interest but is simply made on account of the debt it cannot be said that there is a *payment on account of interest as such* and limitation will not be saved on that footing. The words "as such" mean that

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there must be at the time of the payment some mention that the payment is wholly or partly for interest. It may be possible to infer that the payment was made by the debtor towards interest as such by the surrounding circumstances, for instance, where the amount that is paid represents the interest up to the date of payment or where there is an express provision in the bond that any money paid was to be applied first towards payment of interest and next towards payment of principal and money was paid by the debtor from time to time. The question is whether the words have the same meaning as they had before the amendment. My learned brother Mr. JUSTICE THOM has discussed that in interpreting a statute the intention must not be defeated by too literal an adhesion to its precise language, and where this will lead to a manifest contradiction of the apparent purpose of the enactment a condition may be put on it which modifies the meaning of the words, and sometimes some words may be *rejected* altogether. But even if it be assumed, and indeed we must assume, that the legislature was aware of the view taken by the High Courts and the argument be that if it still allowed the words to remain in the amended section the same meaning should be given to them, I am of the opinion that those words have now lost much of their importance. Before the amendment it was not necessary that the acknowledgment of the payment of interest should be in the handwriting of, or in a writing signed by, the person making a payment. This led to a number of frivolous suits long after the period of limitation prescribed, for it was easy for the plaintiff to say that within the time fixed the defendant paid him a small amount as interest and then the plaintiff attempted to prove such payment by adducing oral evidence which wasted much valuable time but ultimately the suit was in most cases dismissed. There is also no reason why the payment of interest should stand on a different footing from the part payment of the principal. These seem to be the reasons why the legislature made

it essential that the acknowledgment of the payment of interest should also be in the handwriting of, or in writing signed by, the debtor. It is, however, important to note that where part of the principal of a debt is paid by the debtor the words "as such" do not appear and, therefore, it is not necessary that the creditor must prove that the debtor at the time of the payment made some mention that the payment was towards part of the principal as such nor is it essential that this fact should necessarily be inferred from the surrounding circumstances. When construing section 20 of the Limitation Act it is the attitude or the volition of the debtor which has got to be considered and the action of the creditor is not important. The way in which the creditor appropriates the payment is of no significance except as an admission and I have already discussed in an earlier portion of my judgment that an admission must be accepted as a whole or rejected as a whole. The words in both the paragraphs are, "*paid by the person liable to pay the debt or paid by the debtor*" and not '*received or appropriated by the creditor*'. If therefore a plaintiff has failed to prove that the debtor expressly specified that he was making the payment towards interest as such or if such an intention on the part of the debtor cannot be inferred from the surrounding circumstances, it is obvious that the payment was made towards part of the principal (it is assumed that the payment cannot be inferred as a complete discharge of the liability and in this case, for what I have said above, it cannot be so inferred). Further it is not necessary that the payment should either by express words or by implication be towards part of the principal, because the words "as such" do not appear in the second paragraph, and the finding, that payment was towards part of the principal becomes inevitable on the principle of elimination; a debt, as I said before, consists of two portions, namely interest and principal.

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I agree with the learned CHIEF JUSTICE for the reasons given by him that the writing on the back of the bond does not operate as an acknowledgment under section 19 of the Limitation Act.

This is my answer in the case referred to us and I am of the opinion that the suit is not barred by limitation.

BY THE COURT:—Where money is paid by a debtor without specifying whether the payment is towards interest or towards principal, leaving it to the option of the creditor to appropriate it as he likes, and the creditor appropriates it towards interest, there is neither a payment of interest as such nor a part payment of the principal within the meaning of section 20.

The case should go back to the referring Bench for disposal.

## PRIVY COUNCIL

SHIVA NARAIN Jafa (APPELLANT) v. JUDGES OF THE  
HIGH COURT OF JUDICATURE AT ALLAHABAD  
(RESPONDENTS)

J. C.,\*  
1936  
April, 6

[On appeal from the High Court at Allahabad]  
*Advocate—Professional misconduct—Legal Practitioners (Fees)*  
*Act (XXI of 1926), sections 3, 4—General Rules (Civil) for*  
*Subordinate courts, chapter XXI, rules 1 and 2.*

Where an advocate, in the honest belief that he was entitled to do so, stated in his certificate of fees that he had received Rs.140 in cash and Rs.735 "by means of a promissory note" and the certificate in that form was accepted by the District Judge and the sum of Rs.735 was included in the costs allowed in the decree,

*Held*, that the advocate was not guilty of professional misconduct.

APPEAL (No. 100 of 1934) from an order of the High Court (October 31, 1933).

The material facts are stated in the judgment of the Judicial Committee.

1936. January, 13:

*Parikh*, for the appellant.

*Wallach*, for the respondents.

The case of *Bhagwant Singh v. Bhao Singh*, I. L. R., 54 All., 490, was referred to in argument.

The judgment of the Judicial Committee was delivered by Sir SHADI LAL:

This appeal has been brought by an advocate of the High Court of Judicature at Allahabad from a judgment of that Court convicting him of professional misconduct and suspending him from practice for a period of three months.

The appellant, Mr. Shiva Narain Jafa, was practising as an advocate at Badaun, a district situated in the United Provinces of India; and in the beginning of 1927 he was engaged to defend a suit instituted by one Bhagwant Singh, against two brothers, Bhau Singh and Lachhman Singh. On the 22nd January, 1927, he

\*Present: Lord BLANESBURGH, Sir SHADI LAL and Sir GEORGE RANKIN.

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filed in the court of the District Judge, who was hearing the case, a vakalatnama (power of attorney) signed by both the defendants. It appears that they were, at that time, undergoing imprisonment for certain offences, of which they had been convicted; and the appellant, who had been paid only a portion of his fee, submitted on the 8th March, 1927, an application to the District Judge in these terms:

"In the above case it is submitted that I have been looking after this case on behalf of my clients almost from the beginning of January up to this time. The pairokars of the clients have, up to this time, paid me Rs.140. Now a new Act has come into force from 1926 and according to it a Vakil is entitled to get his legal fee and he can realise his money by filing a suit after the case is over. My clients are poor these days and actually they cannot pay up my full fee at present. If my clients will execute, in my favour, a promissory note for the amount of the remaining fee, I shall, according to law, file the certificate of fee and the defendants shall be entitled to recover the same from the plaintiff. If the promissory note is not executed, I shall not file the certificate and the defendants will suffer a double loss, because they shall have to make the payment to me and they shall not be entitled to recover the same from the plaintiff. Therefore, the prisoners may be sent for and the matter may be explained to them. If they will execute the promissory note, it will be in their own interests."

Thereupon, the District Judge recorded on that day the following brief order: "Permitted."

The defendants were then brought into the court room, but they did not sign the promissory note, as, it is explained, they being prisoners could not execute any document without the permission of the local authorities. Whether there is any justification for this explanation, their Lordships are not in a position to determine; but they observe that a promissory note was actually executed on that very day by Musammat Pania, the wife of Bhau Singh, who had given her a general power of attorney to act on his behalf. This instrument contained a promise by her to pay on demand Rs 735, the balance of the fee due to the appellant.

It is not disputed that he himself produced it before the District Judge for his perusal, and the latter placed it upon the record of the case.

Having obtained the promissory note for the balance of his fee, the appellant filed a certificate, in which he stated that he had received Rs.140 in cash and Rs.735 "by means of promissory note". On the 10th March, 1927, the District Judge delivered judgment dismissing the plaintiff's claim with costs. A decree, which followed upon the judgment, was duly prepared, and the sum of Rs.735 was included in the amount of the costs to be paid by the plaintiff, Bhagwant Singh, to the defendants. To this decree no objection was taken by Bhagwant Singh, either at the time of the taxation of costs in the trial court, or in the appeal which he preferred to the High Court on the merits of the case. It is to be observed that his appeal was ultimately dismissed for want of prosecution.

It was not until the 21st August, 1929, that Bhagwant Singh applied to the District Judge for an amendment of the decree on the ground that the appellant had filed a certificate for fee in excess of the amount which could be lawfully allowed as costs between party and party. The applicant denied his liability for the payment of Rs.735, because that sum had not been actually paid to the appellant and could not be allowed as costs to the defendants. The learned Judge overruled the contention, holding that the applicant had failed to show that the accepting of "the promissory note in lieu of actual payment was contrary to any provision of the law". He accordingly decided that "the execution of the promissory note with the sanction of the court was tantamount to actual payment".

This view was not, however, accepted by the High Court, who, on an application made by Bhagwant Singh for revising the order of the District Judge, examined the rule framed for the guidance of the subordinate courts in taxing costs, and reached the con-

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clusion that the rule contemplated actual payment of fee, and not a mere promise to pay, even if such promise was contained in a promissory note, bond, or any other instrument. The learned Judges accordingly granted the application and deleted the sum of Rs.735 from the costs payable to the defendants. The judgment of the High Court is reported at page 490 of the Indian Law Reports, Volume 54 of the Allahabad series.

While the application for revision was pending in the High Court, Bhagwant Singh invoked the disciplinary jurisdiction of that Court by making a complaint on the 19th November, 1930, against the appellant, charging him with professional misconduct. The Court referred the complaint to the Bar Council for an inquiry under section 10 of the Indian Bar Councils Act, XXXVIII of 1926. The inquiry was made by a tribunal composed of three members of the Bar Council, who, after hearing the evidence adduced by the parties, found that, according to the decision of the High Court on the application for revision preferred by Bhagwant Singh, which they were bound to follow, the certificate of fee filed by the appellant should be held to be improper, as it infringed the rule prescribed by the High Court on the subject. They were, however, of the opinion that the appellant had acted "under a *bona fide* misapprehension and misinterpretation of the rule", and had, therefore, committed "an honest mistake".

The finding of the Bar Council was duly submitted to the High Court; and, though no objection was taken to it by the Government Advocate in accordance with rule 2 of the Rules made by the High Court under section 12 of the Indian Bar Councils Act, the learned Judges held that the appellant had "deliberately filed a fee certificate which was not in accordance with the High Court rules, in order that a fee, which had not actually been paid to him, might be taxed"; and that his explanation had not succeeded in satisfying them "about his *bona fides* and straightforwardness".

This is the judgment, the correctness of which is challenged on this appeal. Their Lordships consider it unnecessary to express any opinion as to whether the procedure adopted by the High Court contravened the rules framed under the Indian Bar Councils Act, as they are clear that the facts, as set out above, do not establish any charge of deception or bad faith against the advocate. While they consider that it is a salutary rule that only the fee actually received by a practitioner should be mentioned by him in his certificate for the purpose of the taxation of costs between party and party, they observe that *vis-à-vis* his own client he has recently been placed in an advantageous position. A statute of the Indian Legislature, called the Legal Practitioners (Fees) Act, XXI of 1926, not only allows a legal practitioner to settle, by a private agreement with his client, the terms of his engagement and the fee to be paid to him for his professional services, but also authorises him to enforce that agreement by legal proceedings taken for the recovery of the fee due to him. There can, therefore, be no doubt that the Indian law does not now require a legal practitioner to receive the whole of his fee before the hearing of the case, but permits him to make an agreement for the payment in future of the whole or part of his fee.

The statute, while conferring upon a legal practitioner the right to recover the fee promised by his client, does not authorise the latter to realise it from his defeated adversary. The right of a successful party to recover the fee from the opposite party depends upon the rule framed by the High Court, which contemplates that only the fee actually paid before the hearing can be allowed as costs on taxation.

The question, which their Lordships have to decide, is whether the appellant, by including in his certificate the fee promised, but not actually paid, to him, acted dishonestly or under a misapprehension of the law. A perusal of the printed form of the certificate used

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by him shows that it differs, in certain respects, from the certificate prescribed by the High Court, but there is no material difference in so far as the statement of fee is concerned. It is beyond dispute that he made no attempt to conceal the fact that he had received only a portion of his fee in cash, and that for the balance of his fee he had obtained a promissory note which he produced in the trial court. If he thought that the execution of the promissory note amounted to a payment of the fee, he was not the only person who made that mistake. It is significant that neither the plaintiff nor his counsel suggested, at the time of the taxation of costs, that the defendants could not be allowed the fee which, though promised, had not yet been paid, by them. Nor did the plaintiff urge, in his appeal to the High Court, that the appellant was not justified in entering in his certificate the fee which he was to recover on the promissory note. There can be little doubt that, at that time, none of the persons concerned saw any impropriety in the conduct of the appellant; and that it was after the expiry of more than two years that the plaintiff or his adviser discovered that the sum promised to be paid should not have been allowed as costs. But, as stated, this objection was repelled by the District Judge; and it can not be maintained that the view taken by the learned Judge was the result of any deception practised by the appellant.

Indeed, there is no valid reason why the appellant should have acted in a dishonest manner. He had already obtained a promissory note for the fee due to him, and could, in the event of default by the promisor, enforce his claim by action. There was, therefore, no personal advantage to be gained by deceiving the court.

It is true that his clients would benefit, if the whole of the fee were allowed to them as costs; but that would be hardly an adequate motive which would impel him to take the serious risk of exposing himself to condemnation in his professional career. This aspect of

the question has, it seems, been overlooked by the learned Judges of the High Court.

The circumstances of the case point to the conclusion that the entry in the certificate, upon which the charge of misconduct is founded, was due to the belief that, as the new law enacted by the Legal Practitioners (Fees) Act of 1926 had imposed upon his clients the obligation of paying the fee due on the promissory note, they should have the corresponding right to recover it from the defeated party, which they could do only if it was stated in the certificate and allowed on taxation. This belief was honestly entertained by him, and was apparently shared by many other persons.

Their Lordships do not think that the charge of misconduct can be sustained against the appellant. Accordingly they will humbly advise His Majesty that the judgment of the High Court should be set aside, and that the appeal be allowed.

Solicitors for the appellant: *Hy. S. L. Polak & Co.*

Solicitor for the respondents: *The Solicitor, India Office.*

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### FULL BENCH

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*Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Niamat-ullah and Mr. Justice Bennet*

GENDA LAL (JUDGMENT-DEBTOR) *v.* HAZARI LAL  
(DECREE-HOLDER)\*

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*May, 3*

*Civil Procedure Code, section 11, explanation IV—Constructive Res judicata—Principle how far applicable to execution proceedings—Estoppel by conduct and surrounding circumstances—Civil Procedure Code, order XXI, rules 22, 23—Application for execution, alleging part payment within limitation—Judgment-debtor not appearing and pleading limitation—Order for arrest passed on application and arrest effected—Subsequent raising of plea of limitation.*

The first application for execution of a money decree was made more than three years after the date of the decree, with

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\*Civil Revision No. 71 of 1934.

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an allegation that a part payment had been made which saved limitation; this payment had, earlier, been certified to the court upon an application by the decree-holder *ex parte*. Notice of the application for execution was issued to the judgment-debtor under order XXI, rule 22; he, however, did not appear or raise any plea of limitation. The court recorded a note on the order sheet to the effect that the judgment-debtor was served with notice but had not filed any objection, therefore the application be considered to be within time and be entered in the register and be put up for orders. Thereafter an order was passed for the arrest of the judgment-debtor, as had been prayed for in the application for execution. He was arrested and produced in court, and he then filed an objection that he had not made any part payment and the application for execution was barred by time. The objection was rejected on the ground that it should have been taken earlier, and that having failed to take it at the proper time the judgment-debtor was debarred from taking it now. He was sent to the civil prison, but was released after a week, as subsistence money was not paid. After his release he again filed an objection, on the ground of limitation, against execution proceedings on the application, but the objection was rejected on the same ground as before. Revisions were filed from these orders rejecting the objections:

*Held*, by the Full Bench, that the objection of the judgment-debtor, that the application which was in execution was barred by time, was maintainable.

It is the principle underlying section 11 of the Civil Procedure Code, which is a general principle of estoppel by judgment, which is applicable to execution proceedings; but it must be so applied within the limits prescribed for that principle when applied to suits, and can not be given a wider scope or a more extensive application.

[*Per* NIAMAT-ULLAH, J.:—In certain cases it is a question of difficulty how far the rule enacted in explanation IV to section 11 is an integral part of the general principle of *res judicata*. That principle can not apply unless the question, which explanation IV requires to be assumed to have been in issue though not raised, can be deemed to have been “heard and finally decided” and that depends upon the manner in which the proceedings terminated. If the ultimate result of the proceedings was such as to be accountable only on the hypothesis that the question was decided in the decree-holder’s favour, it may be deemed not only to have been directly and substantially in issue, but also to have been finally decided.]

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The following propositions of law were laid down:

(1) Where there has been an express adjudication by the court in the presence of parties, then the question must be considered to have been finally decided, no matter whether it is raised again at a subsequent stage of the same proceedings or in a subsequent execution proceeding.

(2) Where an objection is taken but is dismissed or struck off, even though not on the merits, and the application for execution becomes fructuous, the judgment-debtor is debarred from raising the question of the invalidity of that application.

(3) Where an objection to execution is taken, and it is not dismissed on the merits or is dismissed for default, and the application for execution does not become fructuous, the judgment-debtor is not debarred from subsequently raising the question that that application was not within limitation.

(4) Where no objection to the execution is taken, and the application becomes partly or wholly fructuous and such fructification necessarily involves the assumption that the application was made within limitation, then after such fructification the judgment-debtor is debarred by the principle of *res judicata* from raising the question that that application was not within limitation.

(5) Where no objection is taken, but the application for execution does not fructify, the judgment-debtor is not debarred by the principle of *res judicata* from raising the question of limitation later.

If the judgment-debtor does not appear and offer any objection, and the court had issued notice on the supposition that the application for execution was in time, no occasion arises for the court to enter upon an inquiry as to whether the application is or is not barred by time. A mere order that the decree should be executed, which under order XXI, rule 23(1) has to be automatic, can not be regarded as a definite adjudication, as between the decree-holder and the judgment-debtor, of any objection which might have been raised if the judgment-debtor had appeared, so as to operate as a bar by implication at all subsequent stages of the proceeding. If the application does not fructify and is struck off, there is no bar of *res judicata* against the judgment-debtor. If, on the other hand, some further step is taken, which amounts to the application for execution fructifying, so as to become analogous to a suit being decreed, then the judgment-debtor would be barred by the principle of *res judicata* from raising the question subsequently.

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[Per NIAMAT-ULLAH, J.:—There may be cases of implied decision of the question of limitation. An order of the court read with other circumstances of the case may lead to the conclusion that the question was present to the mind of the court which meant to decide it but gave no adequate expression to its intention in the order; so that a conscious determination of the question of limitation adversely to the judgment-debtor can be implied.]

Again, a judgment-debtor may not be precluded by the principle of *res judicata* from taking the plea of limitation, but he may yet be barred by the general principle of estoppel arising from his conduct in the course of execution proceedings. There may be cases in which the judgment-debtor's conduct may imply a tacit admission of the truth of the facts alleged in the decree-holder's application as saving limitation, and this admission coupled with other circumstances may operate as an estoppel.]

Mr. Jagdish Swarup, for the applicant.

Mr. G. S. Pathak, for the opposite party.

SULAIMAN, C.J.:—These are revisions from decrees of a court of small causes in which a question of limitation is involved. They have been referred to this Bench as there has been some apparent conflict on the question: as to how far the principle of *res judicata* or estoppel by judgment applies to execution proceedings.

A money decree was passed on the 12th of March, 1928; and more than three years after that date, namely on the 29th November, 1932, the decree-holders filed an application in court certifying the receipt of Rs.50 on the 11th of November, 1930. No notice of this was, of course, sent to the judgment-debtor, and the certificate was noted. On the 15th of February, 1933, the first application for execution was filed, and it was stated in the application that Rs.50 had been received on the 11th of November, 1930, and there was a further allegation that the judgment-debtor had given a slip, which was lost. The decree-holder prayed for the issue of a warrant of arrest. On the 16th of February, 1933, the office reported that the application was in time. Accordingly a notice, possibly under order XXI,

rule 22 of the Civil Procedure Code, was issued, fixing the 6th of March, 1933. On receipt of a report that the judgment-debtor had received the notice but had not signed it, an order was passed on the 6th of March, 1933, to the effect that, inasmuch as notice had been served on the judgment-debtor and he had not filed any objection, therefore the application be considered to be within limitation and be entered in the register and be put up for orders. This was an entry made on the order sheet, which was initialed by the Judge, but was not contained in any separate order. Later on, a warrant was issued on the 9th of March, 1933, and the judgment-debtor was arrested and produced before the court on the 23rd of March, 1933. On this date he filed an objection on the ground that he had never made any payment in November, 1930, and that therefore the application was barred by time. The court summarily dismissed the objection on the sole ground that he had not taken it earlier. He was ordered to be sent to the civil prison, and was released after a week, as subsistence money was not deposited by the decree-holder. The judgment-debtor then filed a fresh objection to the same effect, which was ultimately dismissed on the 19th of August, 1933, on the same ground that the plea of limitation was barred by *res judicata*. The two revisions before us are from the orders dismissing his objection on the 23rd of March, 1933, and the 19th of August, 1933.

The principle of *res judicata*, as laid down in the Code of Civil Procedure, is contained in section 11; but that section in terms applies to a subsequent suit and does not in terms apply to applications for execution. A matter which has been finally decided between the parties in a previous suit is, subject to the conditions mentioned in the section, *res judicata* between the parties and cannot be re-agitated in a second suit. Explanation IV added to section 11 further lays down that any matter which might and ought to have been

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made a ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in such suit, and therefore decided against the defendant. Now, where the former suit, even after certain findings are recorded, is actually dismissed, and therefore the dismissal of such suit is not based on those findings against the defendant but is in spite of them, there would be no *res judicata*. Again, while the suit is pending and the court is still seised of the case, although it may be that a defendant may not be allowed to re-open a finding which has been recorded on a particular issue, there is nothing to preclude the court itself from changing its mind and coming to a contrary conclusion, particularly if a new ruling, containing a fresh interpretation of some provision of law, comes into existence in the meantime. It is not section 11, but the principle of estoppel by judgment underlying that section which has been applied to proceedings in execution with a view to preventing the same point from being re-agitated again.

In the case of *Ram Kirpal v. Rup Kuari* (1), in a case in which the amount of mesne profits awarded had been once ascertained upon a certain construction put on the decree, their Lordships did not allow the matter to be re-opened on the ground that the decision had become final between the parties upon general principles of law though not under section 13 of Act X of 1877. In that case an interlocutory judgment in the suit had been passed and was binding upon the parties while carrying the judgment into execution. Again in *Hook v. Administrator-General of Bengal* (2), where an issue as to the construction of a certain will and codicils had been decided in the lifetime of a survivor of the legatees and the point after her death was sought to be raised a second time by the Administrator-General, their Lordships did not allow it to be raised on the ground that the previous decision must be treated as

(1) (1883) I.L.R., 6 All., 269.

(2) (1921) I.L.R., 48 Cal., 499.

final between the parties though it did not actually come within the purview of section 11, Civil Procedure Code. It is thus the principle underlying section 11, which is a general principle of estoppel by judgment, which has been applied to execution proceedings; but it does not follow that that principle is much wider in scope or more extensive in application than the principle of *res judicata* embodied in section 11 itself.

So far as decree-holders are concerned, it has been laid down by a Full Bench of this Court in *Dhonkal Singh v. Phakkar Singh* (1) that when an order is made striking an execution case off the file of pending cases, or dismissing it on a ground other than a distinct finding that the decree is incapable of execution, or that the decree-holder's right to have the decree executed is barred by limitation or by any other rule of law, or on some similar ground on which the application has clearly been dismissed on the merits, the decree-holder is not debarred by the force of any such order from presenting and prosecuting a fresh application for the execution of his decree. Where, however, there is an express adjudication against the decree-holder which disentitles him either from claiming execution of the whole or part of the decree, such an adjudication would remain binding on him even though he ultimately allows his application to be dismissed or struck off.

In a suit, if a defendant fails to file his written statement within the time allowed or fails to appear at the date of the hearing, the suit may proceed *ex parte*, and he may even be prevented from raising a defence afterwards. But if the suit happens to be dismissed or struck off, there would be no bar against the defendant from raising the defence in a subsequent suit. It would seem to follow that ordinarily the mere non-appearance of a judgment-debtor would not debar him from raising an objection if the application for execution is for some reason dismissed and a fresh applica-

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(1) (1893) I.L.R., 15 All., 84.



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tion is filed. Again, in a suit, even if findings are recorded against the defendant but it is ultimately dismissed or struck off, the findings do not operate as *res judicata* against the defendant, and it is open to him to raise the points again in a subsequent suit. It would seem to follow that where the execution proceeding has not fructified and is, therefore, not analogous to the decreeing of a suit, a mere non-appearance of the judgment-debtor or failure to file objections should not create an absolute bar. Where, of course, objections are actually filed and dismissed the adjudication is necessarily final. Similarly, where in the absence of any objection by the judgment-debtor, orders have been passed on the application which make the application fructuous, and necessarily imply a decision adverse to the judgment-debtor, the matter has to be regarded as having already been adjudicated upon so as not to be capable of being re-opened in a subsequent execution proceeding.

In a suit, so long as the suit is still continuing, the court is seised of the whole matter and may go back upon its own finding, though it may not allow a defendant to insist on its being re-opened. This would be particularly so where it is the duty of the court to intervene, for instance, where insufficient court fee has been paid, or where a necessary succession certificate has not been obtained or sanction of the Collector or the Local Government in some cases has not been obtained, etc. In the same way it would seem *prima facie* to follow that where it is the statutory duty of the court to dismiss an application for execution, the mere fact that the judgment-debtor has not chosen to appear and file objections should not debar the court from discharging its duty. The mere fact that the judgment-debtor has not thought fit to put in an appearance would not exonerate the court from acting as required by law. On the other hand, if in a suit certain pleas, which, if taken, would have been fatal,

were not taken and the suit resulted in a decree, the defendant is debarred from going behind the decree. By analogy it would follow that where an execution proceeding has become fructuous, so that it may be treated as analogous to the decreeing of a suit, the judgment-debtor should not be allowed to go behind the order against him even though the order was passed in his absence and he had failed to appear and file any objections. In the case of a suit a defendant has notice of the full particulars contained in the plaint, as a copy is sent out to him. In the case of an application for execution he may not know all the allegations on which the application is actually based.

In the Full Bench case of *Bisseshur Mullick v. Mahtab Chunder* (1), an application for execution was made on the 13th of September, 1865, and notice was issued to the judgment-debtor and later, on the 29th of March, 1866, it was ultimately struck off. As the original application was barred by time, the Full Bench expressed the opinion that the application was not a proceeding within the meaning of section 20 of Act XIV of 1859 and that "If that application was not a proceeding within the meaning of the section at the time when it was made, it could not subsequently become so merely because the judgment-debtor did not come in and oppose it. The non-opposition by the judgment-debtor clearly was not a proceeding, nor was the issue of process by the court in a case in which that process ought to have been refused a proceeding within the meaning of the Act." Under those circumstances the Full Bench came to the conclusion that that application was barred by time, and that it was open to the judgment-debtor to raise such a plea in a subsequent proceeding based on a later application for execution. Their Lordships of the Privy Council distinguished this case in *Mungul Pershad Dichit v. Grija Kant Lahiri* (2) on the ground that there no order had

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(1) (1868) 10 W.R., (F.B.), 8.

(2) (1881) I.L.R., 8 Cal., 51 (59).

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been made. Apparently the first application for execution in the Full Bench case had not really fructified in any way; but, presumably, after notice had been served on the judgment-debtor the case must have been registered as an execution case and was dismissed later on after a year.

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In cases where there is an express adjudication in an execution proceeding, the matter must certainly be final as between the parties. In the case of *Beni Ram v. Nanhu Mal* (1) the decree had been construed by the execution court to award interest at a certain rate till payment and it was held that the adjudication in the presence of the parties was final and no contrary construction could be placed upon the decree in a subsequent application in the execution proceedings. There again there was an express adjudication on the point raised by the judgment-debtor who had appeared and filed written objections.

Again, in many cases in which persons applied to be allowed to execute the decree as representatives of the original decree-holder, it was held that a decision by the court that they were so entitled could not be re-opened at a subsequent stage at the instance of the judgment-debtor. For instance, the case of *Mumtaz Ahmad v. Sri Ram* (2) (where however the decision also proceeded on the alternative ground that there was no force in the objection); *Taj Singh v. Jagan Lal* (3); *Dwarka Das v. Muhammad Ashfaq Ullah* (4), but in this latter case objection was raised to an application for execution of the 26th of October, 1922, although previously in January, 1921, the judgment-debtor, while an earlier application was pending, had deposited a certain amount in court and prayed that the amount be not paid to the applicant as he was not the transferee, but the court did not grant his application. The learned Judges considered it as one of the circumstances which estopped him from re-opening the matter.

(1) (1884) I.L.R., 7 All., 102.  
(3) (1916) I.L.R., 38 All., 289.

(2) (1913) I.L.R., 35 All., 524.  
(4) (1924) I.L.R., 47 All., 86.

In the case of *Raja of Ramnad v. Velusami Tevar* (1), their Lordships of the Privy Council had to consider a similar point in a case where an application to be brought on the record as an assignee of the decree was actually resisted by the judgment-debtors on several grounds, including the pleas that there was no valid assignment, that the right to execute the decree was barred by limitation and that certain properties of theirs was not liable under the decree. On the date fixed for disposal of the objections the court recognized the transfer of the decree in favour of the assignee and allowed him to execute the decree and directed that he might file a fresh application for attachment. The judgment-debtors applied for review of the decision on the ground that the application was barred by time, but even that application was dismissed and the court expressed the opinion that the previous order had not reserved any question of limitation for future determination. The courts in India had differed as to the interpretation of this order; their Lordships of the Privy Council ruled that it was clear that not only the issue of the execution of the decree being barred by limitation was in fact before the court, as shown by the pleadings on that occasion, but that the Judge at that time was aware of it and that his decision must have been the cause of the rejection of this plea. Inasmuch as no appeal was brought against that order and it stood as binding between the parties, their Lordships held that it was not only competent to the judgment-debtors to bring this plea of limitation forward on the previous occasion but that it was incumbent on them to do so if they proposed to rely on it and moreover it was in fact brought forward and decided upon. In that case objections had actually been filed by the judgment-debtors and they had resisted the application on the ground of the bar of limitation and the learned Judge in holding that the transfer was valid and the

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(1) (1920) 48 I.A., 45.

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assignee was entitled to execute the decree had necessarily decided that the application was not barred by time and indeed he expressed a view that he had not reserved any such question, when dismissing the subsequent application for review. As he was aware of the plea when disallowing the objection, their Lordships held that his decision necessarily implied the rejection of the plea of limitation.

In cases of devolution of interest where substitution in place of the original decree-holder, though not absolutely necessary, may be made, order XXI, rule 16 is applicable. No order can be passed for execution of the decree where it has been transferred, without notice of such application having been given to the transferor and the judgment-debtor. When a question arises whether an assignment has been made or not, the question is something more than a mere matter relating to the execution of the decree. It may involve a dispute between the original decree-holder and his assignee with which the judgment-debtor may have no concern. It is, therefore, something much more than a mere application for execution of the decree against the judgment-debtor. It is the provision of order XXI, rule 16 which applies and the notice that is issued in such a case is issued under that rule and not under rule 22 at all. When on the date fixed the matter comes up before the court, the court has no option but to decide the matter and has to hold either that an assignment has taken place or that it has not. In such cases there is and must be an express adjudication of the question and there is no question of any constructive *res judicata* or any adjudication by implication only. The case is necessarily one of a direct decision.

Much reliance has been placed by the learned counsel for the decree-holder on the case of *Mungul Pershad Dichit v. Grija Kant Lahiri* (1). This is an important case on which a large number of rulings in India have

(1) (1881) I.L.R., 8 Cal., 51.

naturally been based. In that case there were a very large number of steps taken by the decree-holder. The point which came up for consideration before their Lordships was as to whether the sixth application for execution was barred by time, so that it could not be made the basis of a fresh start for purposes of limitation. It is important to bear in mind the proceedings following upon this sixth application. Not only was there no appeal preferred by the judgment-debtor against it, but this application was acted upon and the property sought to be sold under it was attached and remained under attachment until the application for sale which came up for consideration was made. At page 60, their Lordships enumerated the circumstances which had to be borne in mind and remarked: "Here the judgment-debtor, so far from appealing against the order for the attachment, acknowledged its validity, and presented the petition of the 25th of November, 1875, by which he prayed that the sale under the attachment might be stayed for three months, and the execution case struck off for the present, with the attachment remaining in force. Upon that petition being presented the creditors agreed to have the execution stayed in accordance with the petition, 'the attachment on the property continuing'." It was on these facts that their Lordships held that it was "impossible to hold that, if immediately after the expiration of the three months the execution creditors had made the present application, it could, in the face of the order of the 8th of October, 1874, and the *subsequent proceedings*, have been reversed on the ground that the decree was dead" on the earlier date. The decision of their Lordships, therefore, was not at all based on the simple ground that the judgment-debtor had not appeared in response to the notice issued by the court. It was based on the important facts that he had not only not appealed from the order, but he acknowledged his liability. He prayed for a stay of proceedings for a period and entered

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into an agreement with the creditors to let the attachment on the property still continue. It was accordingly in the face of the previous order as well as the subsequent proceedings enumerated above that it was held that the order could not be reversed. It seems to me that this decision has in some cases been misunderstood, and it has been overlooked that in that case there had been an agreement between the creditors and the judgment-debtor in which the validity of the attachment was acknowledged by the judgment-debtor and he had agreed that that attachment should continue for a certain period. It is also clear that he had appeared in court and waived all objections to the validity of the attachment.

The learned counsel for the decree-holder has relied strongly on the case of *Dip Prakash v. Bohra Dwarka Prasad* (1), decided by a Bench of which I was a member. But in that case the judgment-debtor had appeared before the court and filed several objections but failed to raise a particular objection. His objection was disallowed and the execution of the decree was ordered with the result that the amin was deputed with the specific instructions to demolish the pavement in dispute along with other constructions. The order for the removal of the pavement was carried out by the amin and the decree was fully executed. It was then that the judgment-debtor appeared on the scene and asked for damages for the loss suffered by him on account of the improper execution. The Bench accordingly held that it was too late for him to re-open the matter. On the other hand, in the case of *Official Receiver, Aligarh v. Hira Lal* (2) two of us held that where an application for substitution of names as an assignee of the decree was made and the judgment-debtor did not appear to make any objection, but the proceeding did not fructify and the execution case was ultimately struck off, the judgment-debtor was not

(1) (1925) I.L.R., 48 All., 201.

(2) (1935) I.L.R., 57 All., 965.

precluded from pleading that the previous application for execution had been barred by time when he did not challenge the assignment.

There are many cases of this Court, e.g., *Kalyan Singh v. Jagan Prasad* (1) and *Sheo Mangal v. Mst. Hulsa* (2), where objections to the amount entered in the decree sought to be realised have been allowed to be raised for the first time at a much later stage. It would be inequitable to insist on the enforcement of a decree for an amount larger than what is entered therein merely because the judgment-debtor failed to appear at the first opportunity in response to the notice issued by the court. A large number of cases have been cited before us, but in most of them, except two, the judgment-debtor had actually appeared and filed objections.

It seems to me that it would be too much to hold that the mere omission to file objections on the first date fixed in the notice debars the judgment-debtor from raising any objection whatsoever and even exonerates the court from doing its duty in dismissing the application, if it is found to be contrary to the provisions of any statutory enactment. Where, however, the application for execution has become fructuous by reason of some definite proceeding having been taken which necessarily involves the decision that the application must be within limitation, the result would, of course, be different.

Now section 3 of the Limitation Act is imperative and it casts a duty upon the court to dismiss an application which has not been made within the period prescribed in the schedule. The duty of the court is not dependent on an objection being raised by the opposite party. Where, therefore, the application is on the face of it barred by limitation, it is the duty of the court to dismiss it summarily and there is no occasion for calling upon the judgment-debtor

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(1) (1915) I.L.R., 37 All., 589.

(2) (1921) I.L.R., 44 All., 159.



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to show cause why it should not be admitted. Where, however, the question of limitation depends on a question of fact which cannot be determined without taking evidence, the position would certainly be different.

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The contention urged before us is that once a notice is issued under order XXI, rule 22, and the judgment-debtor does not appear and the court passes an order under rule 23, sub-rule (1), then he is debarred from raising any objection whatsoever to the validity of the application, even though that application may ultimately be dismissed. Now before that stage arises, it is the duty of the court under rule 17 to examine the application and satisfy itself that it is in accordance with law. It would also obviously be the duty of the court's office to report that the application is barred by limitation if it is so *prima facie*. The court must therefore make up its mind whether it is within time or not. If it is of the opinion that it is obviously barred by time, it should dismiss the application summarily without issuing any notice to the judgment-debtor at all. Rule 22 requires notice to be issued not for the purpose necessarily of calling upon the judgment-debtor to satisfy the court that the application is barred by time, but in all cases where the application is made after a certain period from the date of the decree or against the legal representatives of the judgment-debtor. Now rule 23 consists of two sub-rules. Sub-rule (1) says that where the person to whom notice is issued under the last preceding rule does not appear or does not show cause to the satisfaction of the court why the decree should not be executed, the court *shall order the decree to be executed*, while sub-rule (2) provides that where such person offers any objection to the execution of the decree, the court *shall consider such objection* and make such order as it thinks fit.

It is accordingly apparent that where the judgment-debtor has appeared and offered any objection, the

court is bound to consider such objection and must make an order thereon as it thinks fit. Such an order would, therefore, if against the judgment-debtor, amount to overruling his objection and dismissing it. It would, by virtue of section 2 read with section 47 of the Civil Procedure Code, be a decree which would be appealable at once. On the other hand, if the judgment-debtor does not appear at all and does not offer any objection, and the court had issued notice on the supposition that the application was in time, no occasion arises for the court to enter upon an inquiry as to whether the application is or is not barred by time. A mere order that the decree should be executed, which under the sub-rule has to be automatic, cannot be regarded as an adjudication of the question as between the decree-holder on the one hand and the judgment-debtor on the other so as to operate as a bar by implication at all subsequent stages in the same proceeding. The distinction between these sub-rules has in most of the cases cited before us not been pointed out at all. It seems to me that when the court is merely directing that in the absence of any objections execution should proceed, it is not adjudicating definitely upon any objection which might have been raised if the judgment-debtor had appeared. If the application does not fructify and is struck off, there is no bar of *res judicata* against the judgment-debtor. On the other hand, where such objections have been actually raised, then the decision upon them is a decree binding upon the judgment-debtor.

In this connection it may be pointed out that it is not every determination of any question that may arise in the execution department which would amount to a decree. As emphasised in section 2, sub-section (2), a decree is the formal expression of an adjudication which so far as regards the court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy, and the

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determination of questions under section 47 is included in it; but such determination must also be a conclusive determination of the rights of the parties with regard to the matter in controversy. In the present case the form which the order took was merely that inasmuch as the judgment-debtor had not filed any objection, the application should be considered as within time and should be put up for orders. This was very much like the form which is to be adopted when an order under order XXI, rule 17, sub-rule (4) has to be made. I cannot regard it as a finding on the question of limitation between the parties, which, even though the application was later on dismissed, remained binding on the judgment-debtor.

If, however, some further step had been taken and the judgment-debtor had remained silent and such step had amounted to the application for execution fructifying, so as to become analogous to a suit being decreed, then certainly it would have been too late for the judgment-debtor to raise an objection that the application itself was barred by time. And the bar would have continued even if that application were dismissed, and objection were raised in a subsequent execution proceeding that the previous application was barred by time. It seems to me that the principle of *res judicata* or estoppel by judgment must be applied to execution proceedings within the limits prescribed for that principle when applied to suits, and cannot be given an unlimited or an extended application.

In the case before us there was intimation given to the judgment-debtor that the decree-holder had alleged a receipt of Rs.50 in November, 1930, but there was no intimation that he was also alleging that a slip containing an acknowledgment of the liability had been handed over to the decree-holder and was lost by him later. On the face of the application it was filed more than three years after the date of the decree and obviously the mere fact of the payment of a sum of money by the judgment-debtor or its being certified by the decree-

holder in court did not amount to any step which would extend the period of limitation. The court had not before it either any written acknowledgment by the judgment-debtor or any affidavit showing that such a written acknowledgment had existed. No intimation of it was given in the notice to the judgment-debtor. The mere fact that he did not appear in response to the notice did not imply that he admitted that the application was in time when, on the face of it, it was barred by limitation. In the present case, therefore, in the absence of any petition or any written acknowledgment of the judgment-debtor, the application filed more than three years after the decree was obviously barred by time and the court should not have issued any notice at all.

It may be added that even if the conclusion had been different, this was eminently a fit case in which the original order of the 6th of March, 1933, made on an application which was *prima facie* barred by time should be revised and set aside.

My conclusions, therefore, are as follows:

(1) Where there has been an express adjudication by the court in the presence of parties, then the question must be considered to have been finally decided, no matter whether it is raised again at a subsequent stage of the same proceeding or in a subsequent execution proceeding.

(2) Where an objection is taken but is dismissed or struck off, even though not on the merits, and the application for execution becomes fructuous, the judgment-debtor is debarred from raising the question of the invalidity of that application.

(3) Where an objection to execution is taken, but it is not dismissed on the merits or is dismissed for default, and the application for execution does not become fructuous, the judgment-debtor is not debarred from subsequently raising the question that that application was not within limitation.

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(4) Where no objection to the execution is taken but the application becomes partly or wholly fructuous and such fructification necessarily involves the assumption that the application was made within limitation, then after such fructification the judgment-debtor is debarred by the principle of *res judicata* from raising the question that that application was not within limitation.

(5) Where no objection is taken but the application for execution does not fructify, the judgment-debtor is not debarred by the principle of *res judicata* from raising the question of limitation later.

NIAMAT-ULLAH, J.:—The question which has been referred to the Full Bench is: "Whether the objection of the judgment-debtor, that the application which is now in execution is barred by time, is maintainable." The circumstances in which the question arose are stated in detail in the judgment of the CHIEF JUSTICE. I would mention only such of them as explain the exact scope of the question which the Full Bench is called upon to answer.

A decree was passed against the applicant on the 12th of March, 1928, for Rs.646. An application for execution of decree was made on the 15th of February, 1933. It stated that the judgment-debtor had paid, on the 11th of November, 1930, a sum of Rs.50, which was certified to the court on the 29th of November, 1932. It should be noted that no notice was issued to the judgment-debtor when the decree-holder certified payment to the court and the latter recorded satisfaction of the decree to the extent of Rs.50. The application for execution, above referred to, was barred by limitation but for the fact that the judgment-debtor was said to have made a payment within three years before the date of the application. A notice was issued to the judgment-debtor under order XXI, rule 22 of the Civil Procedure Code. The process server returned the notice with a report that the judgment-debtor

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refused to take it. The relief claimed by the application for execution of decree was that satisfaction of the decree be obtained by the arrest of the judgment-debtor. The court recorded a note, on the 6th of March, 1933, to the effect that the judgment-debtor was served with notice, and as he did not take any objection on the score of limitation, the application be "deemed to be within time and registered and be subsequently laid before the court for proper orders." Three days later, the court ordered a warrant of arrest to issue. The judgment-debtor was brought under arrest on the 23rd of March, 1933, when he pleaded that the application for execution was barred by limitation. His objection was rejected, as the same had not been taken after the notice was served on him. He was committed to prison, but was released after a week on non-payment by the decree-holder of his subsistence allowance. Thereafter he filed more than one petition of objections at different times, protesting against execution proceedings on an application which was barred by time. His objections were rejected on the ground that they had not been taken in due time. These revisions arise out of two interlocutory orders rejecting the judgment-debtor's plea of limitation in the manner already stated. The question which emerges from these facts is whether failure on the part of the judgment-debtor to object, in answer to the notice sent to him under order XXI, rule 22 of the Civil Procedure Code, that the application for execution was barred by limitation, precludes him from taking such objection at a later stage of the same proceeding.

A mass of case law has been referred to in course of the arguments, from which it is not easy to deduce any precise rule which can be applied to the generality of cases in which a judgment-debtor is said to be precluded from taking the plea of limitation by his failure to take it when a notice under order XXI, rule 22 was served on him. In some cases the question was

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whether a previous application for execution, which was relied on by a decree-holder to save limitation, was itself not barred by limitation. The failure of the judgment-debtor to plead limitation, when he had an opportunity of contesting the first application, was said to be a bar to his right to take that plea when a second application was made by the decree-holder.

It is argued on one side that if, in answer to a notice issued on the decree-holder's application for execution, the judgment-debtor does not plead limitation and suffers an order to be passed by the court that a process of execution be issued, the order pre-supposes, and should be taken to decide impliedly, that the application for execution is not barred by limitation. It is said that even if the application does not, for any reason, result in part satisfaction of the decree, the aforesaid order is conclusive on the question of limitation, when the decree-holder subsequently applies for execution within time from the material *terminus a quo* afforded by the previous proceedings.

It seems to me that the question thus raised cannot be decided by an appeal to the principle of *res judicata* alone, and that in certain circumstances the judgment-debtor may be precluded from taking the plea of limitation by the general rule of estoppel and not by that species of it which is technically known as estoppel by judgment or *res judicata*. The *ratio decidendi* of many judicial decisions is really an estoppel in the wider sense, though at the first sight they seem to be based on the principle of *res judicata*. The question, in my opinion, resolves itself into two subordinate issues; namely, whether the judgment-debtor is precluded from taking the plea of limitation by the principle of *res judicata*; and, if not, whether there was anything in his conduct which estops him from taking such plea. I would accordingly consider both these issues in answering the question referred to the Full Bench.

It cannot be disputed that section 11 of the Civil Procedure Code and its explanations do not, in terms, apply to execution proceedings but that the general principle of *res judicata* is applicable; see *Ram Kirpal v. Rup Kuari* (1). In certain cases it is a question of difficulty how far the rule enacted in explanation IV to section 11 is part of the general principle of *res judicata*. Ordinarily, no order passed in execution, unless it amounts to an adjudication of the question, can operate as *res judicata* at a subsequent stage of the same proceedings, or proceedings taken on a subsequent application. Where a question of limitation has been expressly adjudicated upon, it is obvious that it cannot be re-agitated subsequently in the same proceeding or in proceedings taken on a second application. Where, however, no plea of limitation was taken by the judgment-debtor, or if it was taken, the same was not expressly adjudicated upon, a question of some nicety arises whether an order of the court, passed in furtherance of the execution, should be taken to amount to a decision that the application is not barred. In my opinion the principle of *res judicata* cannot apply unless the question of limitation should be deemed to have been "heard and finally decided". An application for execution can have one of two results. It is either dismissed, or results in relief being granted to the decree-holder. Where the judgment-debtor did not take the plea of limitation on receipt of notice of the application for execution of decree, or took objection which was dismissed for want of prosecution or for some similar reason, without adjudication by the court on the question raised by it, and though some process of execution was issued as desired by the decree-holder but the application did not result in any relief being granted to the decree-holder and was withdrawn, or dismissed for failure of the decree-holder to do something necessary for the further progress of the execution

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(1) (1883) I.L.R., 6 All., 269.



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proceedings, it cannot be said that the issue of limitation was heard and finally decided.

The rule contained in explanation IV to section 11, that any matter that might and ought to have been made a ground of defence or attack in a former proceeding should be deemed to have been a matter directly and substantially in issue in such proceeding. (assuming it to be an integral part of the principle of *res judicata*), merely requires it to be assumed that such a question was in issue, though not expressly raised. It does not go further and lay down that, regardless of the result of the proceeding, it should be deemed to have been adjudicated upon. As to whether it was finally decided depends upon the manner in which the proceeding terminated. If the ultimate result of the proceeding was such as to be accountable only on the hypothesis that the question of limitation was decided in a certain manner, it may be deemed not only to have been directly and substantially in issue, but also to have been finally decided. For instance, if the question of limitation be deemed to have been a matter directly and substantially in issue, because the judgment-debtor might and ought to have raised the plea, and the application for execution results in a certain property being sold in execution of decree and the sale proceeds applied in part satisfaction of the decree, the question of limitation should be deemed not only to have been directly and substantially in issue but should also be deemed to have been heard and finally decided, because the final order of the court terminating the execution proceedings is reconcilable only with one hypothesis, namely that the application for execution was treated by the court as one not barred by limitation. If, on the other hand, the application for execution was eventually dismissed for some reason, the order of the court terminating the proceeding is quite consistent with the hypothesis that the question of limitation was not heard and finally decided. It is the final result

which enables us to determine what questions were in issue, which the court had to decide and did decide in arriving at that result. There is nothing in law to prevent the court from entertaining the judgment-debtor's plea of limitation at any time during the pendency of the application for execution, just as in a pending suit in which *ex parte* proceedings are taken against a defendant the court may allow him to appear and take the plea of limitation. The rule contained in explanation IV to section 11, even where in terms it is applicable, is of no avail to a party pleading *res judicata* if the suit was eventually dismissed against him, for the obvious reason that the decree proceeds against him and on another ground, and the constructive issue imported by the explanation becomes wholly unnecessary and ceases to be directly and substantially in controversy and, at all events, is not heard and finally decided. In this view, it is not necessary, for the purposes of this case, to consider the broad question whether the rule of constructive *res judicata* is applicable to execution proceedings. I may, however, note that it has been persistently held by this Court that it is not. See *Kalyan Singh v. Jagan Prasad* (1), *Phul Chand v. Kanhaiya Lal* (2) and *Sheo Mangal v. Mst. Hulsa* (3).

In the absence of an express adjudication on the question of limitation, which in itself is an order of the nature contemplated by section 47 of the Civil Procedure Code, and therefore a decree, an adjudication cannot be taken to be implied in every interlocutory order which the court passes in furtherance of execution proceedings. Having regard to the nature of such orders, the circumstances in which they are passed and the absence of such formalities in many cases as invest them with judicial character make it highly undesirable that an intention to "hear and

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(1) (1915) I.L.R., 37 All., 589.

(2) (1921) I.L.R., 44 All., 130.

(3) (1921) I.L.R., 44 All., 159.

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finally decide" the question of limitation should be imputed to the court. There is nothing on the record to justify the assumption that the court has already decided it. Dubious inferences from orders passed by the court in furtherance of the execution proceedings cannot, in my opinion, be considered to amount to such adjudications as attract the application of the principle of *res judicata*.

Cases of implied decision of questions of limitation stand on a totally different footing. An order of the court read with other circumstances of the case may lead to the conclusion that the question was present to the mind of the court, which meant to decide it but gave no adequate expression to its intention in the order: *Raja of Ramnad v. Velusami Tevar* (1) was such a case. In that case the judgment-debtor objected to the application for execution on two grounds, namely (1) that the applicant, who claimed to be the assignee of the decree, was not entitled to execute it, and (2) that the application was barred by limitation. The court recorded an order that "The transfer of the decree in favour of the petitioner is recognized and the petitioner allowed to execute the decree. The petitioner may file a fresh application for attachment." On a subsequent application for review being made by the judgment-debtor, the court said that no question was reserved for future determination. In holding that the order of the court was a bar to the judgment-debtor's plea of limitation taken on a subsequent application for execution, their Lordships observed: "It is clear, therefore, not only that the issue of the execution of the decree being barred by limitation was, in fact, before the court (as is shown also by the pleadings) on that occasion, but that the Judge at the time was aware of it, and that his decision included (as legally must have been the case) the rejection of this plea." Their Lordships clearly took it

(1) (1920) 48 I.A., 45.

to be a case of a decision which, though not expressed in plain language, was implied in the court's order. The test, in my opinion, is whether the terms of the court's order warrant the belief that it was conscious of the question of limitation arising between the parties and intended to decide it against the judgment-debtor. Every interlocutory order in furtherance of execution proceedings cannot imply a conscious adjudication of the question of limitation only because the court would not have passed such order unless it was of opinion that the application for execution was within time and therefore the court must be taken to have overruled the plea of limitation.

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The conclusion at which I have arrived is that the judgment-debtor is not barred by the principle of *res judicata*, unless

(1) there was an express adjudication on the question of limitation against him in an earlier proceeding or at an earlier stage of the same proceeding; or

(2) there was an adjudication implied in an order which, taken with surrounding circumstances, should be taken to imply a conscious determination of the question of limitation adversely to the judgment-debtor; or

(3) where the judgment-debtor might and ought to have taken the plea of limitation, but failed to do so, and the final result of the application was to grant the relief of partial satisfaction of the decree to the decree-holder.

A judgment-debtor may not be precluded by the principle of *res judicata* from taking the plea of limitation, but he may yet be barred by estoppel arising from his conduct in the course of execution proceedings. The plea of estoppel, in such cases, is not a plea of estoppel against statute. Where an application for execution is made more than three years after the date of the decree, it will not be entertained by the court at all unless it shows, on the face of it, that limitation

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is saved by some step in aid of execution, or part payment or acknowledgment. To that extent the decree-holder makes an allegation of fact. The failure of the judgment-debtor to controvert such allegation, coupled with his conduct in relation to the proceedings, may bring the case within the four corners of section 115 of the Evidence Act. The principle of the rule (order VIII, rule 5 of the Civil Procedure Code) that every allegation of fact in the plaint, if not denied specifically or by implication, or stated to be not admitted in the pleadings of the defendant, shall be taken to be admitted, except as against a person under disability, may, in the circumstances of a case, be justifiably applied to a judgment-debtor on whom a notice of application for execution of a decree containing an allegation of fact is served. It is easy to conceive of cases in which the judgment-debtor's conduct may imply a tacit admission of the truth of the fact alleged by the decree-holder. A mere admission, however, cannot operate as an estoppel; but coupled with other circumstances may do so. I have read the judgment of their Lordships of the Privy Council in *Mungul Pershad Dichit v. Grija Kant Lahiri* (1) and am of opinion that the judgment-debtor was held to be precluded from raising the question of limitation not by *res judicata* but by estoppel. Their Lordships have not used the words "*res judicata*" anywhere in the judgment. It has been assumed, incorrectly in my opinion, in certain reported cases that their Lordships based their decision on the principle of *res judicata*. In that case a number of applications for execution were successively made. They are all stated at page 57 of the report. The question was whether the seventh application was barred by limitation. That application was admittedly not barred, unless the sixth application, made on the 17th of October, 1874, had become barred by limitation and the decree had become "dead". The High Court's order,

(1) (1881) I.L.R., 8 Cal., 51.

which their Lordships quoted (page 59), was, "A decree once dead, no proceeding by means of an application out of time could revive it." In refuting the view of the High Court, their Lordships referred to the history of the proceedings taken on the sixth application, and observed as follows: "Here the judgment-debtor, so far from appealing against the order for the attachment, acknowledged its validity, and presented the petition of the 25th of January, 1875, by which he prayed that the sale under the attachment might be stayed for three months, and the execution case be struck off for the present, with the attachment remaining in force. Upon that petition being presented, the creditors agreed to have the execution stayed in accordance with the petition, 'the attachment on the property attached continuing'. It appears to their Lordships impossible to hold that, if immediately after the expiration of the three months the execution creditors had made the present application, it could, in the face of the order of the 8th of October, 1874, and the subsequent proceedings, have been reversed, upon the ground that the decree was dead on the 5th of September, 1874, or on the 8th of October, 1874. The present application having been made within three years after the order of the 8th of October, 1874, is as valid as if it had been made immediately after the expiration of the three months."

It is clear to me that the decision of their Lordships of the Privy Council does not rest on any general principle of *res judicata*, but on the peculiar circumstances of the case before them, which clearly estopped the judgment-debtor from questioning the validity of the proceedings, taken on the sixth application, in consequence of his own conduct in taking time and admitting the existence of the debt. The contents of the judgment-debtor's application praying for three months' time are noted at page 57. It is stated that

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he admitted the debt and agreed to the attachment remaining in force.

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The case of *Raja of Ramnad v. Velusami Tevar* (1) has already been referred to by me. It is a case in which a question of construction was involved, and their Lordships construed a previous order as amounting to an adjudication that the application for execution was not barred by limitation.

I do not consider it necessary to notice all the cases that were referred to in course of the arguments. The learned CHIEF JUSTICE has fully dealt with them. I agree with his views, and answer the question referred to the Full Bench in the affirmative.

BENNET, J.:—I agree with the opinion expressed by the CHIEF JUSTICE.

BY THE COURT:—The answer to the question "Whether the objection of the judgment-debtor, that the application which is now in execution is barred by time, is maintainable" is in the affirmative.

## APPELLATE CIVIL

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Before Mr. Justice Niamat-ullah and Mr. Justice Allsop  
DEHRA DUN-MUSSOORIE ELECTRIC TRAMWAY Co.  
(IN LIQUIDATION) (PLAINTIFF) v. HANSRAJ AND OTHERS  
(DEFENDANTS)\*

*Fraud—Damages—Liability of estate of deceased perpetrator of fraud—Survival of cause of action—Succession Act (XXXIX of 1925), section 306—Maxim, Actio personalis moritur cum persona—Measure of damages—Merger of cause of action—Companies Act (VII of 1913), section 235—Award, in misfeasance proceedings, of damages against manager or auditor, etc. for fraud does not bar suit for damages against private persons who also contributed to the fraud.*

B was the managing agent of a company. R was a shareholder and a businessman with whom contracts were placed by the company for the supply of materials, and M was his

\*First Appeal No. 240 of 1931, from a decree of M. A. Ansari, Subordinate Judge of Dehra Dun, dated the 4th of February, 1931.

(1) (1920) 48 I.A., 45.

agent. *B* embezzled certain sums of money, aggregating Rs.39,750, belonging to the company, and then persuaded *M* to help him in concealing the embezzlement from the auditors by *M* executing false receipts covering the amounts and purporting to be payments or advances for materials about to be delivered by *R*. *M* executed the false receipts knowing they would deceive the auditors by hiding the embezzlement, but he was not a participant in the embezzlement itself. A few years later the company went into compulsory liquidation, in the course of which misfeasance proceedings were held and *B* and the auditors were ordered to pay various sums as damages; but little or nothing could be recovered from *B*. Before the order was passed against the auditors, the present suit had been filed by the liquidators and was pending against the heirs of *R* deceased and against *M* for recovery of the loss of Rs.39,750 caused to the company by the fraud of *M* which prevented the prompt discovery of the embezzlement; that order directed the auditors to pay a sum of about Rs.20,000 as well as the Rs.39,750 mentioned above, but deferred and limited the execution in respect of the latter amount only to such part thereof as might not be realised from *M* and the heirs of *R* on the decree in the suit which might be passed against them. The auditors obtained leave to appeal to the Privy Council against the order, and thereafter the matter was compromised with the leave of the court, the liquidators accepting a cash payment from the auditors of Rs.18,000, beyond which there was no expectation of any further recovery, in full satisfaction of their claim.

*Held*, (1) As the false receipts were given by *M* acting as the agent of *R*, and within the scope of his employment, the principal *R* would be equally liable as *M* himself to the company for the loss caused to it by the fraud of *M*.

(2) The cause of action against *R* for this loss did not die with the death of *R* but survived against his estates. This was shown by the provisions of section 306 of the Succession Act. A liability of this kind did not come within the exception contained in the section. The phrase "personal injury" in the exception is intended to mean injury to a person's reputation, mind or body, as distinguished from injury to property; acts which directly give rise to mental or physical suffering or inconvenience come under the exception.

The common law maxim, *actio personalis moritur cum persona*, is no longer regarded in England as one of general application; and in India it has been very largely abrogated

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by statutory provisions contained in section 306 of the Succession Act.

(3) The cause of action for the present suit can not be deemed to have become merged in, or the suit to be barred by, the orders which were passed in the misfeasance proceedings. Proceedings under section 235 of the Companies Act may be described as domestic proceedings between the company and its officers and the orders are passed in a special jurisdiction investing the court with certain powers over the internal affairs of the company. If sufficient sums had been recovered under those orders the present defendants might have escaped liability, wholly or in part, upon the ground that the loss had disappeared or had diminished; but there could be no question of disappearance of a cause of action, as there had been no suit brought on it.

The compromise could not be interpreted to mean that the loss to the company had been satisfied.

(4) The embezzlement of Rs.39,750 was not the result of the fraudulent receipts; they were executed long after the embezzlement was completed. The measure of damages in the present suit was, therefore, not necessarily Rs.39,750. The liability was only for the loss which directly arose by reason of the embezzlement not being brought to light at the time when the audit took place. It was therefore necessary to ascertain what part of the Rs.39,750 could have been recovered from *B* if, but for the false receipts, the embezzlement had been discovered at the audit and measures promptly taken to recover the money.

Dr. K. N. Katju, for the appellant.

Messrs. P. L. Banerji and G. S. Pathak, for the respondents.

ALLSOP, J.:—This is an appeal against a judgment and decree of the Subordinate Judge of Dehra Dun who dismissed a suit instituted by the Dehra Dun-Mussoorie Electric Tramway Company, Limited (in liquidation) through its Official Liquidators for the recovery of a sum of Rs.39,750 against the defendants. These defendants were six persons. Hans Raj and four others were the representatives in interest of Lala Raghu Mal deceased and the sixth was Lala Mela Ram. The defendants are the respondents in the appeal and the Official Receiver of Bengal has also been impleaded as a respondent as the

estate of Raghu Mal is the subject of dispute and the receiver is in possession of it. The plaintiffs are the appellants.

The Dehra Dun-Mussoorie Electric Tramway Company was floated in the year 1921 by Belti Shah Gilani who acted as the managing agent of the company. In the month of March, 1926, the company went into compulsory liquidation. Thereafter, as the result of misfeasance proceedings Belti Shah Gilani and the auditors were directed to make certain contributions. A criminal prosecution was also lodged against Belti Shah and he was sentenced to imprisonment for a period of five years. Lala Raghu Mal carried on business in Calcutta under the style of Madho Ram Hardeo Das and in Delhi under the style of Madho Ram Budh Singh. Mela Ram was the agent of Lala Raghu Mal and as such was in charge of the Delhi business. There were certain relations between Lala Raghu Mal and the Dehra Dun-Mussoorie Electric Tramway Company. At this stage it is sufficient to say that Raghu Mal was a shareholder in the company and that he received certain contracts for the supply of materials. It is contended by the appellants that Belti Shah and Raghu Mal entered into various transactions for their mutual benefit at the expense of the shareholders. This however is a subsidiary point and is not directly in issue in the appeal. It appears that Belti Shah in the years 1922 and 1923 converted three sums of Rs.21,750, Rs.12,000 and Rs.6,000 to his own use. The gravamen of the charge against the defendants is that Lala Mela Ram assisted Belti Shah in concealing these embezzlements from the auditors by executing false receipts and that he is therefore liable to the company, who could have recovered the money from Belti Shah at that time if the receipts had not been executed. The representatives in interest of Raghu Mal are, it is claimed, also liable because Mela Ram executed the receipts in exercise of his duty as the servant of Raghu Mal, and Raghu Mal as the master was liable for the fraud of his

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servant. The learned Subordinate Judge has found that Mela Ram did by executing the receipts enable Belti Shah to conceal his misappropriations for a number of years, but has dismissed the suit because he has also found that Mela Ram was an innocent dupe of Belti Shah's and was not acting deliberately in bad faith when the receipts were executed.

*Allsop, J.*

\* \* \* \* \*

The total of these three sums of Rs.21,750, Rs.12,000 and Rs.6,000 is Rs.39,750. The allegation made by the appellants is that these sums of money were taken by Belti Shah Gilani himself, that they were never paid to Madho Ram Hardeo Das and that the three receipts executed by Mela Ram were to his knowledge fictitious and intended merely to deceive the auditors. In this connection a reference should be made to the ledger of Madho Ram Hardeo Das in the company's books. This ledger shows that a sum of Rs.21,750 was debited to Madho Ram Hardeo Das on the 30th of November, 1922, and a sum of Rs.12,000 on the 31st of January, 1923. These items are described as cash advances. They represent the first two sums alleged to have been embezzled and the total comes to Rs.33,750. On the opposite side of the ledger on the 27th of August, 1923, Madho Ram Hardeo Das are credited with an item of Rs.33,750 which is alleged to have been transferred to the 'Materials purchased awaiting delivery' account. For the third item a reference must be made to the ledger of Madho Ram Budh Singh in the company's books. That shows that an item of Rs.6,000 was debited to that firm on the 31st of March, 1923, as being paid to Belti Shah Gilani and that a similar sum was credited to the firm on the 27th of August, 1923, as having been debited to the materials purchased awaiting delivery account. The whole sum of Rs.39,750 was therefore debited against Lala Raghu Mal at the end of the financial year on the 31st of March, 1922, but after a few months was again credited to him and was transferred to this other account.

viz. the materials purchased awaiting delivery account. The suggestion, as I have already said, is that the debit as supported by the receipts was intended merely for the purpose of the audit and that once the audit was concluded Lala Raghu Mal was relieved of his liability for the payment of this sum.

It is not now disputed by the defendants respondents that these sums of money including that transferred to Narsingh Rao were embezzled by Belti Shah Gilani. They, however, support the finding of the learned Subordinate Judge that there was no conspiracy between Mela Ram and Belti Shah and that Mela Ram himself was deceived by Belti Shah and that he passed the receipts in all innocence.

Mela Ram's case which has a certain plausibility is that Belti Shah Gilani was apparently a man of considerable wealth and position in the business world and that he had a personal charm which enabled him to deceive a number of persons who had business dealings with him. When the circumstances are however examined in detail this defence loses a great deal of its force.

[After dealing with the evidence on this point in detail the judgment proceeded.]

Considering all the circumstances I cannot believe that Lala Mela Ram issued the receipts in good faith. I am convinced that he issued them at the request of Belti Shah in order to deceive the auditors and prevent them from entering upon an inquiry and that it was agreed that the liability should be cancelled as soon as the audit was over and the necessity for it ceased to exist.

\* \* \* \* \*

Having held that Mela Ram deliberately issued false receipts in order to deceive the auditors and to conceal Belti Shah's embezzlement I have now to consider whether that wrongful act gave rise to any claim for damages. I should make it clear that two alternative causes of action were set up in the plaint. The first was based upon the allegation that Mela Ram and Raghu

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Mal had entered into a conspiracy with Belti Shah to misappropriate the money claimed. The second was based upon the allegation that Mela Ram issued false receipts in order to conceal the embezzlement. The learned Subordinate Judge found that the allegation of conspiracy had not been proved and that it had not been established that any part of the money embezzled by Belti Shah had passed to Mela Ram or Raghu Mal. No such evidence has been brought to our notice as would justify us in differing from the learned Subordinate Judge and I hold that he was right in the conclusion to which he came. We are thus left with the second allegation that the wrongful act which gave rise to the claim for damages was the issue of the false receipts and the concealment of the defalcation.

The respondents argue that there can be no decree because this wrongful act did not cause any loss. The money, they say, had already passed into the possession of Belti Shah and had been lost to the company before the receipts were issued, and even if it cannot be said that it was lost beyond recall, still they are not liable unless it can be shown that all of it or some definite part of it could have been recovered from Belti Shah if the embezzlement had been discovered at the audit.

It is true that it has not been established or, at any rate, that there is no finding that a certain particular sum might have been recovered by the company from Belti Shah if Mela Ram had not deceived the auditors by using false receipts and thus prevented them from making further inquiry and discovering the embezzlement. It may perhaps be said that Mela Ram is responsible only for the direct loss which was incurred because the embezzlements were not brought to light at the time when the audit took place. In any case it is desirable that there should be a finding upon this question of fact namely whether any amount, and if so, what amount would have been recovered if the receipts had not been issued. There does not seem to have been

any clear issue before the parties upon this point in the court below. I would, therefore, remit an issue on this point and allow the parties to produce evidence upon it if they wish to do so. \* \* \* \* \*

The respondents allege that the claim of the appellants is barred by certain orders which were passed in proceedings under the Companies Act. One of these orders was to the effect that Belti Shah should refund something over three lakhs of rupees to the company. The other directed the auditors to refund three sums of money. Two of these sums when added together amounted to something over Rs.20,000. By the order of the court that sum was to be paid immediately. The third item was that of Rs.39,750 now in dispute. The court was informed that the suit which has given rise to this appeal was pending and it directed that execution in respect of the sum of Rs.39,750 should be stayed as against the auditors till the suit was decided and should then proceed only in respect of any part of the sum which was not recovered from the defendants. The auditors obtained leave to appeal to their Lordships of the Privy Council, but when matters had reached that stage the parties with the leave of the Company Judge settled their dispute out of court. The liquidators of the company accepted a sum of between Rs.18,000 and Rs.19,000 in full satisfaction of their claim and the auditors withdrew their appeal.

The respondents argue that the appellants' right to institute a suit has merged by these orders in *rem judicatam*. The appellants rely upon the rule in *The Koursk* (1) that a suit against one wrongdoer does not bar a suit against the other when there are two wrongs which jointly cause a single loss, and the rule in *Goldrei, Foucard and Son v. Sinclair* (2) that a suit to recover a specific sum of money paid does not bar a suit to recover damages for the deceit which led to the payment. It may be that the former rule applies to Mela Ram and

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(1) [1924] P., 140.

(2) [1918] 1 K.B., 180.

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the auditors and the latter to Mela Ram and Belti Shah, but I do not think that it is necessary to express any definite opinion upon these points. The fact in this case is that the liquidators never sought and never obtained any decree for damages for tort either against Belti Shah or against the auditors. The proceedings under section 235 of the Companies Act were, if I may so describe them, domestic proceedings between the company and its officers and the orders were passed in a special jurisdiction investing the court with certain powers over the internal affairs of the company. If any sums had been recovered under those orders Mela Ram might have escaped liability wholly or in part upon the ground that the loss had disappeared or had been diminished, but there can be no question of the disappearance of a cause of action because it has been the basis of a suit. Nothing has been recovered from Belti Shah and one of the liquidators has made a statement, which I see no reason for not accepting, that he is now a pauper. The auditors or one of them has paid between Rs.18,000 and Rs.19,000 but there was an immediate liability of over Rs.20,000 apart from the possible deferred liability of this Rs.39,750 which is now in issue. The respondents suggest that the compromise must be interpreted to mean that the whole claim was satisfied. I cannot accept this suggestion. It has been explained by one of the liquidators that there were doubtful questions of law involved in the Privy Council appeal and that inquiries had disclosed that the auditor concerned would not have been able to pay more than the sum he proffered, while the other auditor had left the country and had no property available to the liquidators. That being so, the liquidators wisely accepted all that they could hope to get. As against the auditor with whom they came to terms they can claim no more, but that is no reason why we should constructively hold something which is not true, namely, that the company has recovered a sum of money which it has not

recovered. The company is still out of pocket to the extent of Rs.39,750. Mela Ram is in whole or part responsible and he must make good the loss to the limit of his responsibility.

The respondents plead that the suit is barred by limitation because it was instituted in June, 1929, and the wrong, if any, was done in 1923. They wish to apply the provisions of article 36 of the Limitation Act. That is a residuary article. This is clearly a suit for a relief on the ground of fraud and article 95 applies to it. That being so, time begins to run from the date of the knowledge of fraud. The respondents argue that the company must be deemed to have had knowledge at least on the date (November 7th, 1924) when the directors passed their resolution sanctioning the transfer of this sum from the ledgers of Madho Ram Budh Singh and Madho Ram Hardeo Das to the 'materials purchased awaiting delivery' account because the directors should have known then that no cash payment had been made to the two firms. There is no force in the argument. It is clear that the directors were deceived and had no knowledge. The liquidators have established that the fraud came to light only when Mela Ram made a statement in 1928 in the course of misfeasance proceedings. The liquidators were appointed in April, 1926, and one of them has stated that they first became suspicious about the transactions in dispute in December, 1926, after making an investigation into the affairs of the company. There is no reason to doubt this statement. Even if time began to run in December, 1926, the suit was within time. The appellants also relied upon the provisions of sections 14 and 18 of the Limitation Act but it was not necessary to invoke the aid of these provisions. I hold that the suit was not barred by limitation.

It was one of the points taken by the respondents in the court below that the appellants were barred from suing because the directors had sanctioned the transfer of the liability from one account to another and had thus

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countenanced the whole proceeding. This point was not argued before us. It is difficult to see why the liquidators should not be allowed to recover because Belti Shah had deceived the directors and had thereby induced them to sanction the transfer. The directors, as one of them has explained in evidence, had no idea that they were dealing with anything but a formal matter.

On the findings which I have recorded Mela Ram is certainly liable for the amount which was lost owing to his action. There still remains the question of the liability of the estate of Raghu Mal, as represented by the other respondents. Raghu Mal himself would, I have no doubt, have been liable if he had been alive. Learned counsel for the respondents is not prepared to admit that Mela Ram had authority to issue receipts but he had to concede that Mela Ram did issue receipts and that his right to do so was never questioned. There are also letters and telegrams which give him full authority to deal with the company on behalf of Raghu Mal. I hold that Mela Ram was the servant of Raghu Mal and that in giving the receipts he acted within the scope of his employment.

It remains then to be decided whether the cause of action against Raghu Mal survives against his executors and administrators. According to the principles expressed in the axiom *actio personalis moritur cum persona* the right of action would not survive. We are, however, not concerned so much with those principles as with the statutory provisions in section 306 of the Succession Act. According to that section the liability of a deceased wrongdoer survives except in cases of defamation, assault as defined in the Indian Penal Code and other personal injuries not causing death. The question is, what the term "other personal injuries" is intended to mean. In *Krishna Behari Sen v. Corporation of Calcutta* (1) and *Bhupendra Narayan v. Chandramoni Gupta* (2) the Calcutta High Court gave the term the very

(1) (1904) I.L.R., 31 Cal., 993.

(2) (1926) I.L.R., 53 Cal., 987.

restricted meaning of bodily injuries analogous to assault. In *Motilal Satyanarayan v. Harnarayan Premsookh* (1), *Rustomji Dorabji v. Nurse* (2), *Punjab Singh v. Ramautar Singh* (3) and *Mahtab Singh v. Hub Lal* (4) the term was given a wider interpretation so as to include malicious prosecution. I would agree that these four cases were rightly decided, but they are not authority for the proposition that the word "personal" was used in the section in any technical sense. In my opinion "personal injury" is intended to mean injury to the person as distinguished from injury to property. Defamation, malicious prosecution, assault and bodily hurt may all indirectly cause financial loss or financial expenditure but they are in the main injuries which are personal in that they directly give rise to mental or physical suffering or inconvenience. In the case before us there was no injury of that nature. Mela Ram's deception was the direct cause of pecuniary loss to the company. No mental or physical suffering was directly inflicted upon any person. I would, therefore, hold that Raghu Mal's estate is liable to the plaintiffs in the same degree as Mela Ram himself.

NIAMAT-ULLAH, J.:—The facts of this case are stated in detail in the judgment delivered by my brother, ALLSOP, J., with whose conclusions I find myself in entire agreement. I desire to make a few observations on the important question of fact on which the decision of the case largely depends. I have taken time to consider the point in all its aspects and made due allowance for the fact that the learned Subordinate Judge arrived at a different conclusion. I may, however, point out that the case is not one in which the trial court is in a peculiarly better position than the court of appeal in recording a finding on a question of fact. The conclusion rests on inferences to be drawn from proved circumstances of the case, and not on believing or disbelieving witnesses. Excepting the evidence of Mela Ram, whose good faith

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(1) (1923) I.L.R., 47 Bom., 716.  
(3) (1919) 4 Pat.L.J., 676.

(2) (1920) I.L.R., 44 Mad., 357.  
(4) (1926) I.L.R., 48 All., 630.

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is in controversy, the evidence bearing on the point is all circumstantial.

In all cases of fraud which is not capable of proof by direct evidence, we have to fall back upon inferences to be drawn from circumstances established by evidence. The party alleging fraud is nevertheless bound to establish it by cogent evidence, and suspicion cannot be accepted as proof. Unless, therefore, the proved circumstances are incompatible with the hypothesis of the person charged with fraud having acted in good faith, they cannot be accepted as affording sufficient proof of fraud. I have approached the case from this point of view, and have been driven to the conclusion that the evidence, as a whole, excludes all hypothesis of good faith on the part of Mela Ram in granting the three receipts to Belti Shah Gilani.

The plaintiff's case, in the first instance, is that there was a conspiracy between Mela Ram and Belti Shah Gilani, in pursuance of which the sum of Rs.39,750 was embezzled. I may say at once that the evidence falls far short of establishing any such conspiracy. I am convinced that Mela Ram was not in Belti Shah's confidence when the latter misappropriated the various sums making up Rs.39,750.

[After dealing with the evidence in detail the judgment proceeded.]

In my opinion, the only inference from these circumstances is that Mela Ram granted the receipts to extricate Belti Shah from a difficulty; and when the crisis was over, he demanded such entries being made as would protect the interests of his principals. He was aware of the exact situation and was a party to the fraud successfully practised by Belti Shah on the auditors.

\* \* \* \* \*

I agree with my learned brother that the plaintiff's suit is not barred by limitation or by the fact that in proceedings under the Companies Act certain sums were awarded, in winding up proceedings, against the auditors.

I also agree that Mela Ram acted within the scope of his authority when he gave receipts to Belti Shah. It was not disputed before us that, if Mela Ram had the authority to grant the receipts and if his conduct amounted to fraud, his principals are liable to the company for the fraud of their agent.

One of the pleas taken by the defendants other than Mela Ram is that the estate of Raghu Mal which is now represented by his executors is not liable for damages as the cause of action did not survive against the legal representatives of the deceased wrongdoer. The contention is based on the maxim *actio personalis moritur cum persona*. The English law is undoubtedly in favour of the defendants' contention. It is thus summarised in Halsbury's Laws of England, first edition, volume 14, paragraph 726: "The general rule is that the representative can not be sued for a wrong committed by the deceased for which unliquidated damages only would be recoverable; the rule is expressed in the maxim *actio personalis moritur cum persona*, and the principle is applicable both at law and in equity. Thus an action for deceit will not lie against the representatives of a person who has fraudulently induced another to take shares in a company or even to purchase shares from the deceased himself." The maxim has been the subject of adverse comments, in that it is too broadly stated and leads to inequitable results in many cases. By some Judges it has been characterised as "barbarous". In India there is no statutory law of torts and the courts are expected to administer rules of justice, equity and good conscience. They, however, apply English law which is taken to embody rules of justice, equity and good conscience. If all that has been said about the maxim is even partially true it can not be applied as embodying those high sounding principles. The Indian legislature seems to have recognized this drawback and attempted to provide against an indiscriminate application of the maxim. The Legal Representatives' Act (XII of

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1855) allows an action to be maintained against the legal representatives of a wrongdoer for damages for wrongs committed within one year before his death. This left a big loophole for application of the maxim, inasmuch as the Act covers only torts committed by a person, since deceased, during the year preceding his death. In the case before us Raghu Mal died in 1926 and the alleged fraud committed by his servant occurred in 1923. The Act, therefore, does not help the plaintiffs. Another inroad made on the maxim by the Indian legislature was the rule enacted by section 89 of the Probate and Administration Act (V of 1881), since re-enacted in section 306 of the Indian Succession Act (XXXIX of 1925) which provides: "All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory." This, again, abrogates the maxim only partially. Legal representatives other than executors and administrators are outside the section and certain causes of action are expressly excluded from the operation of the section. This gave rise to an interesting question of interpretation of the exception, on which there is a difference of opinion between the Calcutta High Court on the one side, *Krishna Behari Sen v. Corporation of Calcutta* (1), and the High Courts of Bombay, Madras, Allahabad and Patna on the other, *Rustomji Dorabji v. Nurse* (2), *Haridas Ramdas v. Ramdas Mathuradas* (3), *Mahtab Singh v. Hub Lal* (4), *Punjab Singh v. Ramautar Singh* (5). In all these cases the question was whether the cause of action for a suit for damages for malicious prosecution

(1) (1904) I.L.R., 31 Cal., 903.

(2) (1920) I.L.R., 44 Mad., 257.

(3) (1889) I.L.R., 13 Bom., 677.

(4) (1926) I.L.R., 48 All., 630.

(5) (1919) 4 Pat.L.J., 676.

survives against the executors and administrators of the deceased wrongdoer and the exception, contained in the Probate and Administration Act or the Indian Succession Act, applied or not. The Calcutta High Court interpreted the exception strictly and held that no cases except those of "defamation, assault, or other *personal injuries* not causing the death of the party" were outside the section. They construed the words "personal injuries" as physical injuries. Malicious prosecution, which, according to them, is distinct from defamation, is not within the exception. The other High Courts, on the contrary, maintain that the words "personal injuries" should be taken *equidem generis* with defamation and are not confined to strictly physical injuries. Some Judges have gone so far as to hold that malicious prosecution is an aggravated form of defamation. All of them are of opinion that injury to a man's reputation which is involved in malicious prosecution is a personal injury.

It seems to me that the case before us is free from the difficulty which is involved in cases of malicious prosecution, which is akin to defamation and may be personal injury in that it affects a person's reputation and causes mental pain and physical discomfort and is therefore within the exception. But a fraud of the kind alleged in this case is not, by any means, akin to defamation nor is it personal injury in the sense of being an injury to a person's reputation, mind or body. It has no reference to his person in the widest sense of the term. The fraud complained of in this case prevented a timely disclosure, so as to deprive the company of a chance of recovering more than it was able to do later when the fraud came to light in another manner. It is, in my opinion, a wrong which affected the company's property. The learned advocate for the defendants seemed to suggest that personal injury includes injury to the "personal property", as distinguished from "real property", as known to English law. This is too far fetched a construction of the simple words "personal injuries" occurring in an

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POKHAR SINGH (JUDGMENT-DEBTOR) *v.* TULA RAM  
(DECREE-HOLDER)\*

*Civil Procedure Code, sections 47, 60; order XXI, rule 64—  
Attachment and sale of property exempted by law—Objection  
not raised by judgment-debtor before the sale—Objection  
raised after sale but before confirmation—Whether barred  
—Estoppel—Constructive res judicata.*

In execution of a money decree a house of the judgment-debtor was attached and sold; the judgment-debtor did not appear or raise any objections. After the sale, but before it was confirmed, he appeared and made an application under section 47 of the Civil Procedure Code objecting to the sale on the ground that the house was that of an agriculturist and therefore exempt by section 60 from attachment and sale:

*Held*, that the objection was maintainable. So long as the sale had not been confirmed it could not be said that there had been, by necessary implication, any decision, at any stage of the case, that the property was saleable, which would be conclusive as between the parties and would operate as a bar against all objections. Order XXI, rule 64 authorises the execution court to order a sale of the property, provided it is liable to sale: a mere order of sale does not necessarily decide or mean that the property is saleable. The right to object to the sale would arise after the sale had taken place. The mere fact that the judgment-debtor was negligent at an earlier stage and did not object to the attachment itself would not necessarily amount to an estoppel against him, as there could be no estoppel against a statutory right.

Mr. G. S. Pathak, for the appellant.

Mr. Basudeva Mukerji, for the respondent.

SULAIMAN, C.J., and MULLA, J.:—This is a judgment-debtor's appeal from an order dismissing an objection under section 47 of the Civil Procedure Code to an auction sale. In execution of a simple money decree a house of the judgment-debtor was attached some time before the 13th of December, 1931. He did not appear at all to file any objection to the attachment. Various

\*First Appeal No. 495 of 1933, from a decree of Priya Charan Agarwal, Subordinate Judge of Pilibhit, dated the 31st of July, 1933.

steps were taken and notices were issued under order XXI, rule 66 for the judgment-debtor to appear at the time of the settlement of the terms of the proclamation of sale; but he did not appear at all. Ultimately the property attached was sold on the 19th of January, 1933, and purchased by the decree-holder. Before, however, the sale could be confirmed, the judgment-debtor, on the 18th of February, 1933, filed an application under order XXI, rule 90, praying for the setting aside of the sale on the ground of certain irregularities and fraud in conducting and publishing it. Later, on the 27th of April, 1933, but before the sale could be confirmed, he filed another application under section 47 of the Civil Procedure Code objecting to the sale on the ground that the property was the house of an agriculturist and was exempt from attachment and sale under section 60 of the Civil Procedure Code. The court below has dismissed this objection summarily on the ground that it was not maintainable inasmuch as it was filed after the sale had taken place. The appeal has been preferred from this last order.

The court below has relied on the authority of the case of *Umed v. Jas Ram* (1) in support of the view that the objection was too late. In that case the learned single Judge relied on the cases of *Durga Charan Mandal v. Kali Prasanna Sarkar* (2) and *Ramchhaibar Misr v. Bechu Bhagat* (3), both of which can be easily distinguished. Indeed, in the former case, the Calcutta High Court actually held that even "the confirmation of sale was no bar to the application that was made by the judgment-debtor to have it declared that in execution of such a decree the holding could not be sold, the question being one which related to the execution, discharge and satisfaction of the decree." The main ground on which the learned Judge held that the objection could not be entertained was that "In my opinion a judgment-debtor who might have raised objections prior to the sale but who

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(1) (1907) I.L.R., 29 All., 612.

(2) (1899) I.L.R., 26 Cal., 727.

(3) (1885) I.L.R., 7 All., 641.



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has refrained from doing so, and who might have appealed against the order for sale, has no right after the sale has been carried out to prefer an objection that the property sold was not legally saleable." That case was decided under the provisions of the old Civil Procedure Code (Act XIV of 1882). Under section 284 of that Code the court could order the sale of any property which had been attached, or a portion thereof. That section did not lay any particular stress on the question as to whether the property was saleable or not. It was held in some cases that such an order was appealable and was tantamount to an order against the judgment-debtor, which necessarily implied that the property was saleable. It was presumably on account of this view that the learned Judge considered that where a judgment-debtor allows an order for sale to be passed and does not appeal from such an order he should not be allowed to object to the sale at a later stage.

The scheme of the new Civil Procedure Code is not identical. Order XXI, rule 64, which corresponds to the old section 284, is differently worded and authorises the court executing a decree to order a sale of the property attached by it, or a portion thereof, only if it is *liable to sale*. Thus, where there is property not liable to sale, rule 64 would not be applicable. A further difference arises because of the fact that an order under rule 64 is no longer appealable. The right of appeal arises only when the sale has been confirmed later. It cannot, therefore, be said under the new Code of Civil Procedure that, when an order for sale was made under rule 64, the judgment-debtor had a right of appeal, of which he did not avail himself.

Section 60, which is embodied in the substantive part of the Code of Civil Procedure, provides that certain particulars "shall not be liable to attachment or sale". Among these particulars are houses and other buildings belonging to an agriculturist and occupied by him.

It is our duty to interpret the section in such a manner as not to make any words used therein in any way superfluous. The fact that the legislature has thought it fit to make the specified particulars neither liable to attachment nor liable to sale is very significant. It would seem to follow *prima facie* that, even if by some mistake or other a wrong attachment has taken place, there is still a prohibition against the sale of such property. Admittedly the right to object to the attachment of a non-attachable property can arise after the attachment has taken place. It would seem to follow that the right to object to the sale of a non-saleable property ought also to arise after such a sale has taken place. When a sale has been confirmed and the property has become completely vested in the auction purchaser, it may be said to imply a decision that the property was saleable, which may operate as a bar against any objection raised by the judgment-debtor after the confirmation; but that argument cannot be applied to a case where there has yet been no confirmation and the sale is still subject to confirmation. It is impossible, in the latter case, to say that there has been by a necessary implication any decision, at any stage of the case, that the property was saleable, which would be conclusive as between the parties and would operate as a bar against all objections. Had an appeal been allowed from an order of sale under order XXI, rule 64, we might have been inclined to follow the ruling in the earlier case; but that is not the position now.

The objection that a certain property is not saleable is obviously not an objection which would fall within the scope of order XXI, rule 89 or rule 90, but is an objection to the execution of the decree governed by section 47, Civil Procedure Code. Under that section it is the duty of the court to decide all questions arising between the parties to the suit relating to execution, discharge or satisfaction of the decree. There is no time limit prescribed for raising such an objection; and we are unable

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to hold that, so long as the court is functioning and has not become *functus officio* after the confirmation of the sale and the satisfaction of the decree, it can be too late for the judgment-debtor to invite the attention of the court to its statutory duty under section 60 to see that a property which is not saleable should not be sold. The mere fact that the judgment-debtor was negligent at an earlier stage and did not object to the attachment itself may affect the question of costs but would not necessarily amount to an estoppel against him, as there should be no estoppel against a statutory right. To hold that once a sale has taken place, howsoever wrong and illegal it may be, there is a complete bar and the court has no option but to proceed to confirm the sale of a property which is non-saleable under section 60, will be nullifying the provisions of that section, which is a result that ought to be avoided.

We are, therefore, of the opinion that the court below has erred in holding that the objection of the judgment-debtor to the saleability of the property was not maintainable. We accordingly allow this appeal, and setting aside the order of the court below send the case back to that court with the direction to restore it to its original number and to dispose of it according to law.

### REVISIONAL CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice  
and Mr. Justice Mulla

1935  
July, 26

GANGA RAM v. HABIB-ULLAH AND ANOTHER\*

*Evidence Act (I of 1872), sections 126, 162—Criminal Procedure Code, section 94—Criminal court ordering a person present in court to produce a document then in his possession—Inherent jurisdiction—Whether production can be refused on the ground of privileged communication by client to lawyer—Privileged communication.*

Section 94 of the Criminal Procedure Code gives power to the court to issue a summons or written order to a person to

\*Criminal Reference No. 7 of 1935.

produce a document, which is in his possession, in court; where, however, the person is actually present in the court room and the document is with him, the formality of issuing a summons is quite unnecessary and the court has equal inherent power to order him to produce the document. Clause (3) of the section exempts documents which are protected under sections 123 and 124 of the Evidence Act, but not section 126; therefore, in criminal cases the protection under section 126 afforded to communications by client to lawyer can not be availed of against an order to produce the document; the document must be produced, and then, under section 162 of the Evidence Act, it will be for the court, after inspection of the document if it deems fit, to consider and decide any objections regarding its production or admissibility.

Dr. N. U. A. Siddiqui, for Azmat Husain Mukhtar.

The Assistant Government Advocate (Dr. M. Waliullah), for the Crown.

SULAIMAN, C.J., and MULLA, J.:—This is a reference by the District Magistrate of Pilibhit recommending that an order of a Bench of Honorary Magistrates calling upon the complainant's Mukhtar in a case pending before them to produce in court a particular document should be quashed, or in the alternative steps be taken against the Mukhtar under the Legal Practitioners Act.

It appears that the complainant had previously filed an application in the court of the District Magistrate against the accused, which was returned to him with the direction to file a regular complaint. Upon this the complaint in this case was filed. The complainant and his witnesses had apparently denied that the witnesses also had signed the previous application. After the complainant and one witness had been examined, and the second witness was being cross-examined, the counsel for the accused filed an application before the court that the application in the possession of the complainant's Mukhtar should be allowed to be inspected by the accused and that it should be caused to be filed, as there was an apprehension that it might be destroyed. The complainant's Mukhtar stated that the papers with him were receipts in connection with this case, and then he

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was put the question by the court, "Have you got in your hand the petition which was made by the complainant in the court of the Collector?" He answered, "I have not got it." After that the case continued. The cross-examination of the witness was completed, and then two more witnesses were examined and the statement of the accused was then taken down. Finally a charge was framed and read out. After the charge had been framed, the accused's Mukhtar filed another application in the court that for the sake of further cross-examination the application, which had been returned to the complainant and which was in the hand of the Mukhtar for the complainant, should be caused to be filed. In reply to this application the complainant's Mukhtar filed a written application stating that his client had given him some papers in connection with the case, that the disclosure of such papers would have an adverse effect on the case, that as a legal adviser he did not think it necessary to disclose the same and that he did not want to file the papers; but that if the court considered it necessary that the papers should be filed and thought that nothing would go against his client if the papers were filed, then he would file the same. After this the court heard arguments of both the Mukhtars on the point and concluded that it was necessary that the paper in dispute should be filed, and accordingly passed an order for the filing of the same. Upon this the complainant's Mukhtar filed the document, but prayed that it should be kept in a sealed cover.

The first question for consideration is whether the application was a privileged document which the complainant's Mukhtar could refuse to produce. Protection was claimed under section 126 of the Indian Evidence Act; but the provisions of that section obviously do not apply to this case. Under that section a legal practitioner is not permitted, without his client's express consent, (1) to disclose any communication made to him in the course and for the purpose of his employment as

such legal practitioner, or (2) to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or (3) to disclose any advice given by him to his client in the course and for the purpose of such employment. That section deals, therefore, with disclosures of communications made in the course, and also for the purpose, of his employment as legal adviser. He was not called upon to disclose any such communication. Again, the section apparently does not refer to the production of documents which are in the possession of a legal adviser but to stating the contents or condition of any of the documents with which he has become acquainted in the course and for the purpose of his employment. Nor was he called upon to disclose any advice which he had given to his client. It follows that the proviso to that section was equally inapplicable, as he was not called upon to disclose any communication made in furtherance of any illegal purpose or to disclose any fact which had been observed by him in the course of his employment showing that any crime or fraud had been committed. The protection in this section does not refer to the production of documents, as against which the client himself is not protected. The section dealing with the production of documents is section 162 of the Indian Evidence Act, under which a person summoned to produce a document shall, if it is in his possession or power, bring it to court, notwithstanding any objection which there may be to its production or to its admissibility. It is for the court to decide the validity of any objection to its production or admissibility. The second paragraph of the section lays down that the court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility. This paragraph certainly lays down that the court has a discretion in the matter, if it deems fit, to inspect such a document, even though there is an objection to its

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production or to its admissibility, provided that it does not refer to matters of State. Except in the case of matters of State the court may inspect the document, though there is an objection as to its production. Indeed, under the last paragraph, the court may even get the document translated by a translator, who may be enjoined to keep the contents secret, unless the document is to be given in evidence. It would, therefore, follow that the Mukhtar could not validly object to the order of the court to produce the document, at least for the inspection of the court, before the court decided whether the objection to its production was or was not valid.

These provisions should apply even to civil cases. Under order XVI, rule 7 of the Civil Procedure Code, any person present in court may be required by the court to give evidence or to produce any document then and there in his possession or power.

In the present case, the Mukhtar had much less justification for refusing to produce the document, as it was a criminal case in which the procedure was governed by section 94 of the Code of Criminal Procedure. Under that section a court has power, if it considers that the production of any document is necessary, to issue a summons or a written order to the person in whose possession or power such document is, to produce it at the time and place stated. In terms the section would apply to a person who is absent at the time and who is called upon to attend the court and produce the document in his possession. It is significant that sub-section (3), which contains an exception, only exempts documents which are protected under sections 123 and 124 of the Indian Evidence Act, i.e., documents relating to affairs of State and official communications, and not section 126, which applies to professional communications made to legal advisers. Thus, in a criminal case even the protection under section 126 cannot be availed of.

The learned District Magistrate has, however, come to the conclusion that, inasmuch as section 94 of the

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Code of Criminal Procedure empowers the court to issue a summons, and as no written summons was issued in the present case, there was no authority to call upon the Mukhtar to produce the document. It seems to us that the omission to comply with the formality of getting a summons issued, when the person was actually present in the court room, was a trivial irregularity. Obviously the court has inherent jurisdiction to call upon a person present in the court room to produce a document which is in his possession at the time. When he is not present in the court room, a summons has to be issued; but even that is not absolutely necessary, for if the court is of the opinion that the document may not be produced, a search warrant may be issued instead of a summons. We are, therefore, of the opinion that the court was entitled to order the complainant's Mukhtar to produce any document which he had in his possession at the time while in the court room. It was the duty of the Mukhtar to produce the document, and then request the court to consider his objection as to its production or admissibility.

Were it clear that the complainant's Mukhtar had that particular application actually in his hands when he was asked whether he had got it in his hands and he replied that he had not got it, his denial would be a gross professional misconduct, because it was a deliberate attempt to mislead and deceive the court. The denial would not be in the nature of claiming a privileged protection, but a deliberately false statement with a view to mislead the court. If this point were clear, we would have taken a very serious view of the conduct of the Mukhtar; but, as stated above, it appears that a considerable time elapsed between the denial and the actual production of the document in court, with the result that it might well have been that at the particular time when he was questioned whether this particular application was in his hands, the Mukhtar did not have that document in his hands. As regards the delay in produc-



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ing it, the conduct of the Mukhtar was certainly reprehensible; but the question was one of law, and was not free from some difficulty, and the Mukhtar concerned was an inexperienced junior practitioner. When specifically ordered by the court that he should produce the document, he did produce it, though under protest. We would, therefore, direct that no action be taken on account of his failure to produce the document at the first opportunity. We, however, decline to quash the order directing him to produce the document. Let the case be returned.

### APPELLATE CIVIL

*Before Sir Shah Muhammad Sulaiman, Chief Justice  
and Mr. Justice Bennet*

1935  
July, 31

NIHAL CHAND AND ANOTHER (DEFENDANTS) v. BHAGWAN  
DEI (PLAINTIFF)\*

*Privacy, right of—Customary right—General custom of province  
—Judicial notice—Not necessary to allege and prove existence  
of such custom in the locality—Evidence Act (I of 1872),  
section 57.*

It is well established and recognized that a customary right of privacy exists generally in these provinces, and it is open to a court to take judicial notice under section 57 of the Evidence Act of the general prevalence of such a custom having the force of law. It is, therefore, not necessary that such custom should be alleged and proved by evidence produced in each case to establish it.

*Bhagwan Das v. Zamurrad Husain* (1), disapproved.

Mr. G. S. Pathak, for the appellants.

Mr. Shiva Prasad Sinha, for the respondent.

SULAIMAN, C.J., and BENNET, J.:—This is a defendants' appeal arising out of a suit brought by the plaintiff for the closing up of a large window in the upper storey opened recently by the defendants, on the ground that her right of privacy was infringed inasmuch as her

\*Appeal No. 27 of 1934, under section 10 of the Letters Patent.

(1) (1929) I.L.R., 51 All., 986.

courtyard and house were overlooked. The first court dismissed the suit, relying mainly on certain observations made in the case of *Bhagwan Das v. Zamurrad Husain* (1); but the lower appellate court has reversed that decree, holding that the right of privacy based on social custom and parda system is quite different from the right of privacy based on natural modesty and human morality, and that the latter is not confined to any class, creed, colour or race, and it is the birthright of a human being and is sacred and should be observed, though the right should not be exercised in an oppressive way. That decree has been affirmed by a learned Judge of this Court.

In appeal the learned counsel for the defendants has first urged before us that there being no finding that the plaintiff is the owner of the house occupied by her she has no *locus standi* to maintain the suit. It has been found by the courts below that the plaintiff has been occupying this house for the last quarter of a century, that her possession has never been challenged during this period and that she is not in wrongful possession of this house at all. Even if she were not the owner, she would have a right as occupier to maintain the suit under section 4 of the Indian Easements Act.

The next contention urged in appeal is that in view of the observations made in the case referred to above, the right of privacy cannot be allowed unless it is affirmatively urged and proved in each case that there is a custom of privacy prevailing in the particular locality. The case of *Bhagwan Das* (1) was not one in which the whole of the plaintiff's house or a courtyard or even the whole of a room was overlooked by the new windows and doors. But it was possible to see from the defendant's window into the plaintiff's window. No doubt the learned Judges made some observations suggesting that the right of privacy may not now be in full force after the lapse of nearly half a century since the case of *Gokal Prasad v. Radho* (2) was decided, but in the special

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(1) (1929) I.L.R., 51 All., 986.

(2) (1888) I.L.R., 10 All., 358.

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circumstances of that case they did not feel called upon to consider that point. Apparently the attention of the learned Judges was not drawn to the fact that there have been numerous cases in this Court even subsequent to *Gokal Prasad's* case in which such a right of privacy has been recognized even without strict proof of the existence of a custom in the particular locality.

In *Abdul Rahman v. Emile* (1) EDGE, C.J., and KNOX, J., held that the customary right of privacy which prevailed in various parts of the North-Western Provinces was a right which attached to property and was not dependent on the religion of the owner thereof. In that case the right of privacy was recognized in Landour. The learned Judges pointed out that on the question of privacy the defendant's plea that the law recognized no such right of privacy as was claimed was not sound and that the law does recognize the right of privacy in these provinces when established by custom, and followed *Gokal Prasad v. Radho* (2).

In the case of *Abdul Rahman v. Bhagwan Das* (3) KNOX, J., upheld the right of privacy, even though some other portion of the plaintiff's house was actually overlooked from the defendant's roof. The learned Judge observed: "The primary question will be, does the privacy in fact and substantially exist, and has it been and is it in fact enjoyed? If it is found that it did substantially exist and was enjoyed, the next question would be, was that privacy substantially or materially interfered with by acts done by the defendant, without the consent or acquiescence of the person seeking reliefs against those acts?" In that case, however, it was admitted that in the town of Meerut there was a local custom in favour of privacy.

In the case of *Jamil-uddin v. Abdul Majeed* (4) RAFIQ, J., held that even apart from the evidence as to the existence of a right of privacy, it had been laid down in *Gokal Prasad's* case (2) that at any rate in these provinces

(1) (1893) I.L.R., 16 All., 69.

(2) (1888) I.L.R., 10 All., 358.

(3) (1907) I.L.R., 29 All., 582.

(4) (1915) 13 A.L.J., 361.

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the custom of parda has for centuries been strictly observed by all Hindus except those of the lowest classes and by all Muhammadans except the poorest.

In *Fazal Haq v. Fazal Haq* (1) IQBAL AHMAD and SEN, JJ., held that a customary right of privacy within certain limitations exists in the North-Western Provinces and a material interference with such a right is an actionable wrong and affords a good cause of action to the person or persons affected thereby, and that in view of the social conditions of this country and as the direct result of the custom which has descended from olden times, the right of privacy has taken too deep a root to be dislodged by any *à priori* reasoning.

In *Chhedi Ram v. Gokul Chand* (2) another Bench of this Court, of which one of us was a member, held that even the existence of a public lane in between the houses of the parties would not destroy such a right of privacy.

Unfortunately these earlier cases were not brought to the notice of the Bench which decided *Bhagwan Das's* case (3). In the case of *Tika Ram Joshi v. Ram Lal Sah* (4) it was conceded that by local custom a right of privacy does exist in the cities and plains of these provinces, and it was only argued that no such custom exists in towns and villages situated in the hills.

When a particular custom is of general prevalence and is commonly recognized, it is open to a court to take judicial notice of such custom having the force of law under section 57 of the Indian Evidence Act, and it is therefore not necessary that there should be evidence produced in each case to establish such a custom. Indeed in many villages where the custom has been so well recognized that no one has dared to infringe it, there might be no instance to prove that the custom was denied and upheld on a previous occasion. We, therefore, think that the view taken by the learned Judge of this Court that the suit was rightly decreed was correct.

The appeal is accordingly dismissed with costs.

(1) (1927) 26 A.L.J., 49.

(2) (1928) I.L.R., 50 All., 706.

(3) (1929) I.L.R., 51 All., 986.

(4) [1935] A.L.J., 432.

## MISCELLANEOUS CRIMINAL

*Before Mr. Justice Allsop and Mr. Justice Bajpai*EMPEROR *v.* WAHID ULLAH AHRARI\*1935  
August, 1

*Contempt of Courts Act (XII of 1926), section 3—Order to pay costs—Jurisdiction—Mode of enforcement of such order—Criminal Procedure Code, section 547—Inherent jurisdiction—Direction to Collector to realise by execution against property of the accused.*

Where, in a case under the Contempt of Courts Act, XII of 1926, the High Court awarded a punishment of four months' simple imprisonment and also ordered the accused to pay a certain sum as costs of the Crown and of the complainant:

*Held*, (1) that the High Court had jurisdiction to pass the order for payment of costs; and (2), without deciding whether the costs could be realised as a fine under the provisions of section 547 of the Criminal Procedure Code, it was clear that the High Court had inherent jurisdiction to order the recovery of the amount, and in exercise thereof a warrant was issued to the Collector authorising him to realise the amount by execution, on the lines on which decrees are executed by the civil court, against the movable or immovable property of the accused.

The Assistant Government Advocate (Dr. M. Waliullah), for the Crown.

Mr. B. S. Darbari, for the accused.

ALLSOP and BAJPAI, JJ.:—On the complaint of one Muhammad Istehsan proceedings under the Contempt of Courts Act XII of 1926, were started in this Court against S. M. Wahidullah Ahrari in connection with certain articles published by the latter in a paper at Aligarh while a complaint under section 500 of the Indian Penal Code was pending in a subordinate criminal court at Aligarh. By an order dated the 26th of October, 1934, passed by a Bench of this Court, Wahidullah was punished with simple imprisonment for a term of four months. He was also directed to pay the costs of Muhammad Istehsan and the Crown, and the costs of Muhammad Istehsan were fixed at Rs.100 and of the Crown at Rs.100. In the result Wahidullah was

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\*Criminal Miscellaneous No. 281 of 1935.

directed to deposit Rs.200 as costs in this Court within two months.

The costs were not so deposited within the time allowed by this Court, and on the 30th of April, 1935, notice was issued to Wahidullah to show cause why the costs should not be realised as a fine under the provisions of section 547 of the Criminal Procedure Code. In reply to the notice it is contended by Mr. *Darbari* that this Court had no jurisdiction to pass an order for costs and that in no event could such costs be recoverable as a fine under the Code of Criminal Procedure. So far as the first contention is concerned we are of the opinion that it is not open to this Bench to consider the matter. If the order of the former Bench was without jurisdiction, other proceedings ought to have been taken for questioning the order. As it is, we are satisfied that this Court has such jurisdiction. In a number of cases this Court under similar circumstances has directed the person punished under the Contempt of Courts Act to pay the costs of the Crown. The same procedure was followed in the English courts, and cases to that effect are mentioned by Oswald in his book on "Contempt", third edition, page 242.

The next question that arises is whether we have the power to direct the realisation of costs as a fine according to the provisions of the Code of Criminal Procedure. This question is not without some difficulty, and it is not necessary for us to express an opinion on the point. In any event if we have jurisdiction to direct the payment of costs, as indeed we have, we have inherent jurisdiction to order its recovery. We think that the proper method by which these costs should be recovered should be on the lines on which decrees are executed by the civil court. We issue a warrant to the Collector of Aligarh authorising him to realise the amount by execution against the movable or immovable property of Wahidullah.

Finally, it was contended that Wahidullah was very poor and that we should, on the ground of such poverty,

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allow him to be discharged without paying the costs which he was ordered to pay. An application to this effect has been filed before us today, but it is not supported by any affidavit, and it is not possible for us to investigate the matter as to whether he is possessed of sufficient means or not. After all we are not directing the recovery of this amount by the arrest of Wahidullah; we have only authorised the Collector to realise the amount by proceeding against the movable and immovable property of the defaulter, and, if he is not possessed of such property, execution obviously will be infructuous.

### APPELLATE CIVIL

*Before Sir Shah Muhammad Sulaiman, Chief Justice  
and Mr. Justice Bennet*

1935  
August, 20

KANHAIYA LAL (DEFENDANT) v. SHIVA LAL (PLAINTIFF)\*

*Abadi—Co-sharer zamindar's house in abadi—Co-sharer's share in zamindari sold by auction—Position qua house—Ownership of materials, right of residence and right of transfer of house not affected.*

When a co-sharer zamindar, who owns a house in the village, loses his share in the zamindari by auction sale and becomes an ex-proprietary tenant, he loses his joint right in the site of the house but does not lose his proprietary right in the materials of the house nor his right of residence in it, nor his right of transfer of the house. A transfer of the house by him conveys a full title in the materials of the house and in the right of residence therein.

*Zahur Hasan v. Mst. Shaker Banoo* (1), disapproved.

Dr. N. U. A. Siddiqui, for the appellant.

Mr. Panna Lal, for the respondent.

SULAIMAN, C.J., and BENNET, J.:—This is a Letters Patent appeal by a defendant against a decree of a learned single Judge of this Court. The plaintiff is the zamindar of the village and he sued for a decree that the

\*Appeal No. 3 of 1934, under section 10 of the Letters Patent.

(1) A.I.R., 1925 All., 29.

defendant should remove the materials of a house within a specified time and that the site of the house should be given to the plaintiff. The history of the house is as follows. Mst. Jasoda was a co-sharer in the village and she owned this house. There was an auction sale in 1885 by which her zamindari share was sold. She became an exproprietary tenant and was succeeded by Lala Ram, her adopted son, and in May, 1929, Lala Ram sold this house to the appellant. The court below has found that there is no custom by which a ryot can transfer a house. It further found that Mst. Jasoda occupied this house as a ryot and her son Lala Ram also occupied it as a ryot, and that the village in question, Gopalpura, was not an agricultural village but it was a village which is one mile from the town of Agra, and this village Gopalpura is included within the municipal limits of Agra. The majority of the inhabitants of the village are chamars who are engaged in manufacturing shoes and who are not agriculturists. The case as argued before us in Letters Patent appeal involves certain considerations. These considerations are, what are the rights of a zamindar, a co-sharer, when there is an auction sale of his zamindari share? It was argued for the respondent zamindar that the co-sharer was reduced to the level of the other ryots in the village and that the house owned by the co-sharer became non-transferable. This argument was founded on a ruling by a learned single Judge of this Court in the case of *Zahur Hasan v. Mst. Shaker Banoo* (1). The problem appears to us to involve the following factors. When Mst. Jasoda was a co-sharer she had a proprietary title in three things; (1) a joint right in the site; (2) a proprietary right in the materials, and (3) a right of residence in this house on this site. By the auction sale we consider that only No. 1 was transferred, that is, she lost her undivided share in the village abadi. But we do not consider that she lost her proprietary rights in either (2) or (3). In

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our opinion the sale of her undivided share in the village and in the abadi could not lessen the proprietary title which she had in the materials of the house and could not lessen her right of residence in that site. Before the sale of her share she had a right of transfer of this house. This was apart from her ownership of an undivided share in the abadi. By the auction sale she did not lose her right of transfer of the house but she retained this right of transfer, and the exercise of this right of transfer in May, 1929, by her adopted son conveyed a full title in the materials of the house and in the right of residence in the house to the appellant. We consider that a distinction should be drawn between the position of persons who have been zamindars and who in their capacity as zamindars own houses, and the condition of persons who are mere ryots. In the case of a mere ryot the zamindar grants a licence to the ryot to make a residence. Such a licence remains a licence and the ryot has no right of transfer of the house which he makes in pursuance of such licence. But a house built or bought by a zamindar is a transferable house and such rights of transfer do not cease when the zamindar loses his rights in the village. In regard to the ruling in the case of *Zahur Hasan v. Mst. Shaker Banoo* (1) we cannot accept the proposition of law laid down at the end of the ruling as a proposition of general application, and we consider that in regard to the houses of zamindars who lose their proprietary rights the dictum which we have stated is correct. For these reasons we allow this Letters Patent appeal and we dismiss the suit of the plaintiff with costs in all courts.

(1) A.I.R., 1925 All., 29.

## REVISIONAL CRIMINAL

Before Mr. Justice Ganga Nath

PEAREY LAL *v.* NARAINI\*

1935  
August, 30

*Criminal Procedure Code, section 488—Maintenance order—*

*Duration of order—Wife's returning to live with husband does not automatically cancel order—Order enforceable after the wife is again turned out.*

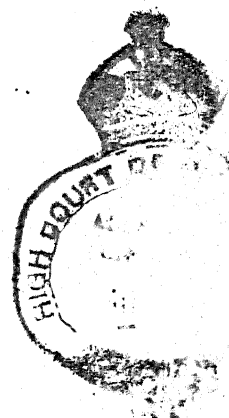
A maintenance order passed under section 488 of the Criminal Procedure Code in favour of the wife remains in force until it has been cancelled or modified by the court under section 488(5) or section 489, and the mere fact that after the order the wife went and lived with her husband for some time, until she was turned out by him again, would not automatically cancel or terminate the operation of the order, though it would suspend the operation for the period during which she lived with her husband. The same order can therefore be enforced by her after such period.

The general principle of law that an order, of which the term is not fixed and of which the currency is not made expressly dependent upon the continued existence of some circumstance or set of circumstances, remains in force until it is cancelled is applicable to maintenance orders passed under section 488 of the Criminal Procedure Code.

Mr. *E. V. David*, for the applicant.

The Assistant Government Advocate (Dr. M. Waliullah), for the Crown.

GANGA NATH, J.:—This is an application in revision by Pearey Lal against an order of Mr. Abdul Waheed Khan Khalil, Magistrate, first class, Meerut, under section 488 of the Criminal Procedure Code. This order was confirmed by the learned Sessions Judge of Meerut in revision. The opposite party Mst. Naraini, wife of the applicant, obtained an order under section 488 of the Criminal Procedure Code for maintenance on 11th March, 1932, against the applicant. The applicant made an application stating that he was willing to take his wife back, but it was rejected. Mst. Naraini lived



\*Criminal Revision No. 595 of 1935, from an order of R. L. Yorke, Sessions Judge of Meerut, dated the 15th of July, 1935.

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for some time thereafter with her husband and when she was turned out again by her husband she went to live with her sister. In 1935 she made an application to recover the maintenance (Rs.4 a month) which had been allowed to her under the order of 11th March, 1932. The applicant contested this application on the mere ground that Mst. Naraini had been living in adultery and therefore was not entitled to any maintenance. Both the parties produced evidence on this point and it was found by the learned Magistrate that the applicant's objection was false and that Mst. Naraini had not been living in adultery and was entitled to maintenance, and he passed an order for the payment of the arrears due. Against this order a revision was filed, which was rejected by the learned Sessions Judge, Meerut, as stated above.

The only point that is pressed by the learned counsel for the applicant here is that the order of 11th March, 1932, became ineffectual and unenforceable on account of Mst. Naraini having gone to and lived with her husband after the order. The learned counsel for the applicant relies on *Phul Kali v. Harnam* (1). There a reference was made by the learned Sessions Judge as follows: "I think the woman should have instituted formal proceedings under chapter XXXVI of the Criminal Procedure Code, that the Joint Magistrate should have heard what the husband had to say as to his willingness to keep the woman with him, and should have considered any evidence produced by either party, and then should have decided whether the wife was entitled to receive any allowance from her husband. I think the Joint Magistrate was wrong in simply directing payment of arrears under the order of June, 1881. I recommend that his order be set aside." On this, STRAIGHT, J., ordered: "I entirely agree with the learned Judge in the view which he takes of the Joint Magistrate's order, and concur in all that he has said upon

(1) Weekly Notes, 1888, p. 217.

the subject. The Joint Magistrate's order must be and is quashed." It appears that all that was done in that case was that the Joint Magistrate's order, which had been passed without giving any opportunity to the husband to show cause as to why he should not pay arrears, was set aside. In this case, a notice was issued to the husband and he was given full opportunity to show cause as to why he should not pay the maintenance which had been ordered against him. There is nothing in the order of STRAIGHT, J., referred to above, to show if the order of maintenance was held to have become inoperative, if so on what grounds. The mere fact that a woman goes to live with her husband for some time is not sufficient to make the order ineffectual, though it may have the effect of suspending the order for the period the woman lives with her husband.

The general principle of law that an order, whose term is not fixed and whose currency is not made expressly dependent upon the continued existence of some circumstance or set of circumstances, remains in force until it is cancelled, is *prima facie* applicable to maintenance orders passed under section 488 of the Criminal Procedure Code. The husband may, on proof of circumstances specified in section 488(5) or section 489 of the Criminal Procedure Code, obtain the cancellation or modification of the original order, as the case may be, and until he does that, the original order must be deemed to be still in force. The mere fact that a wife has returned to live with her husband will not bring the order to an end automatically, and on her separating from him again, she can enforce it. Section 488(5) of the Criminal Procedure Code provides for the cancellation of the order. The reasons given therein for cancellation are not exhaustive. Section 489 of the Criminal Procedure Code provides for variation of the order as well as for its cancellation in consequence of any decision of a competent civil court.

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Section 490 of the Criminal Procedure Code which relates to the enforcement of the order lays down: "A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due." The only conditions laid down in respect of the enforcement of the order under section 490 of the Criminal Procedure Code are the identity of the parties and the non-payment of the allowance due. If any such thing occurs as may be fit to vacate the order, the proper procedure for the husband is to apply to the court and get the order cancelled. So long as the order stands it is capable of being enforced, though in the case of the woman living with her husband it would remain suspended for the period during which she lives with her husband. This view is supported by *Kanagammal v. Pandara Nadar* (1) and *Parul Bala Debi v. Satish Chandra* (2).

There is no force in the application. It is therefore ordered that it be rejected. The stay order is discharged.

### APPELLATE CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice  
and Mr. Justice Bennet

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September, 2

NATH SAH (DEFENDANT) v. DURGA SAH (PLAINTIFF)\*

*Negotiable Instruments Act (XXVI of 1881), section 80—Promissory note—Interest not mentioned—Right to interest—Date from which interest is to be allowed—Contract Act (IX of 1872), section 25(3)—Promise to pay time barred debt—Whether the promise must specifically mention the time*

\*Second Appeal No. 623 of 1932, from a decree of Shamsul Hasan, District Judge of Kumaun, dated the 7th of December, 1931, confirming a decree of L. H. Niblett, Subordinate Judge of Naini Tal, dated the 14th of March, 1931.

(1) (1926) I.L.R., 50 Mad., 663.

(2) (1923) 75 Indian Cases, 529.

*barred debt—Promissory note in lieu of time barred debt plus fresh advance—Negotiable Instruments Act, section 44.*

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A promissory note, payable on demand, was executed for Rs.900. There was no mention in it about any interest to be paid; nor was there any specification or reference to any items of consideration making up the Rs.900. In the suit brought on this note it transpired that the consideration was made up of Rs.500 on a former time barred promissory note, about Rs.200 interest on that sum although that promissory note mentioned no interest nor was any oral agreement to pay interest proved, and Rs.200 fresh advance in cash: *Held* that the plaintiff was entitled to recover Rs.500, the amount of the former promissory note, but no interest thereon, plus the Rs.200 cash advance, together with interest on the aggregate Rs.700 at 6 per cent. simple from the date of institution of the suit.

According to section 80 of the Negotiable Instruments Act, where no rate of interest is specified in a promissory note or bill of exchange, then notwithstanding any agreement relating to interest to the contrary the interest is to be calculated at the rate of 6 per cent. per annum, and the date from which such interest should be calculated should be the date on which the principal amount ought to have been paid, that is, it became payable. The word "same" in the section should be understood to refer to the amount due on the instrument and not to the interest on that amount.

Where the amount on an instrument is payable immediately, there can be no doubt that the interest is to be calculated from the date of execution. But where the amount becomes payable only on demand, or at or after sight or presentation, it can not be said that the principal "ought to have been paid" on the date of execution; and therefore the interest should not be calculated from that date. No doubt it is not necessary for a plaintiff to make any previous demand of payment before instituting his suit on the basis of a promissory note, and the suit can not fail for want of a previous demand; nevertheless the amount can not be said to have been payable until the demand is made, and in this case the demand is not considered to be made until the suit is filed; accordingly the interest has to be calculated from the date of the suit.

The clause, in section 80 of the Negotiable Instruments Act, "notwithstanding any agreement relating to interest between any parties to the instrument" applies not only as regards the rate at which interest is to be calculated but also

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as regards the date from which such interest is to be calculated. So, in the present case, even if any private agreement to pay interest had been proved, interest at 6 per cent. would have to be calculated only from the date of the suit.

Where there is not merely a promise to pay a time barred debt, but there is a novation of contract under which fresh consideration passes from the promisee and there is on the part of the promisor the receipt of such consideration as well as a promise to pay a time barred debt, the two taken together would amount to a valid agreement, although the previous debt had been barred by time. A fresh contract of this kind is in no way illegal or void; the mere inadequacy of the consideration can not affect the validity; nor can it be said that any part of the consideration was either absent from the beginning or had subsequently failed, within the meaning of section 44 of the Negotiable Instruments Act.

*Semble*, where there is nothing but a mere promise in writing to pay a time barred debt, a specific reference to such debt is necessary in order that the promise may become operative under section 25(3) of the Contract Act.

Mr. Basudeva Mukerji, for the appellant.

Messrs. G. Agarwala and Kartar Narain Agarwala, for the respondent.

SULAIMAN, C.J., and BENNET, J.:—This is a defendant's appeal arising out of a suit on a promissory note, dated the 22nd of June, 1929, for Rs.900, which contained no mention of any liability to pay interest. The plaintiff alleged in the plaint that the promissory note had been executed in respect of some old debt, and after borrowing money in cash. In his defence the defendant pleaded that he had received only Rs.200 out of the amount of the promissory note and did not get the balance. He also denied his liability to pay interest, which the plaintiff had alleged had been agreed upon orally to be at 1 per cent. per mensem. The plaintiff replied that although only Rs.200 had been paid in cash, the balance of Rs.700 consisted of a sum of Rs.500 due on a previous promissory note of the 15th of April, 1926, and Rs.200 interest due thereon at 1 per cent. per mensem as well as Rs.20 on a parole debt. The court of first instance decreed the claim for Rs.900 together

with past and future interest at 6 per cent. per annum. The defendant appealed, but the plaintiff submitted to the decree. On appeal the decree of the first court has been affirmed.

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The first point urged in appeal is that the consideration of Rs.700 alleged by the plaintiff was non-existent inasmuch as the debt had become time barred. A time barred debt cannot be recovered, and an oral promise to pay a time barred debt is not a good consideration under section 25 of the Indian Contract Act. But if the promise to pay a time barred debt either wholly or in part is made in writing and signed by the person to be charged therewith, then the consideration is not void under sub-section (3) of that section. In the present case the defendant in writing signed by him agreed to pay Rs.900, which apparently included the time barred debt as well; but there was no specific reference to this earlier debt. There is some authority for the view that it is not necessary for the purposes of section 25, sub-section (3), specifically to refer to the previous time barred debt, so long as it can be ascertained that there is a promise in writing to pay such debt: *Ganapathy Moodelly v. Munisawmi Moodelly* (1). On the other hand, there are some observations in the case of *Appa Rao v. Suryaprakasa Rao* (2) which support the contrary argument, though the latter case can be distinguished on facts.

It seems to us that where there is nothing but a mere promise to pay a time barred debt, then unless that promise is in writing and signed by the person to be charged therewith, it would not form a good consideration. But where there is not merely a promise to pay a time barred debt, but there is a novation of contract under which fresh consideration passes from the promisee and there is on the part of the promisor the receipt of such consideration as well as a promise to pay a time barred debt, the two taken together would amount to a valid

(1) (1909) I.L.R., 33 Mad., 159.

(2) (1899) I.L.R., 23 Mad., 94.



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agreement, although the previous debt had been barred by time. This would be particularly so where it was clear that the creditor would not have advanced further consideration unless a promise to pay the time barred debt had also been made. The case of *Bindeshri Prasad v. Sarju Singh* (1) has some bearing on this point. In that case the defendant's father, while a ward of the Court of Wards, had executed a promissory note in favour of the plaintiff for a certain sum, and after release of the estate and the death of the defendant's father, the defendant executed a fresh bond in favour of the plaintiff for an additional consideration and also promising to pay his deceased father's debt. It was held that the contract was not unlawful and was enforceable. In that case the bond was executed before the coming into force of the Usurious Loans Act of 1916. The court held that section 25 was not applicable to such a case. It is difficult to hold that a fresh contract of this kind is in any way illegal, void or ineffective. The mere inadequacy of the consideration cannot be inquired into by the court. Nor can it be said that any part of the consideration was merely absent within the meaning of section 44 of the Negotiable Instruments Act or that a part of the consideration had subsequently failed. We therefore hold that the courts below have rightly held that the amount due on the previous promissory note could have been legally included in the consideration for the second contract. The same argument would have applied to the promise to pay interest at the contractual rate of 1 per cent. per mensem on the previous debt, which also would then have been a part of the consideration for the second contract.

We find, however, that neither the plaintiff nor his father specifically stated that there was any agreement at the time of the execution of the first promissory note to pay interest at all. Indeed, as regards the second promissory note, although the plaintiff said that it was

(1) (1923) 21 A.L.J., 446.

settled orally between them that interest would be paid at 1 per cent. per mensem, the plaintiff's father clearly stated that no interest had been agreed on when the promissory note Ex. A was written. There is also no clear finding by the lower appellate court that any such agreement had really been entered into. We must accordingly disallow interest on that amount.

The second contention urged on behalf of the appellant is that the interest on the second promissory note should not be allowed at all, in any case not from a date earlier than the institution of the suit. It seems to us that although there might be no agreement as to payment of interest entered in the promissory note, a collateral agreement to this effect can be proved under proviso (2) to section 92. Where the written agreement merely mentions the promise to pay the principal and is silent as to the payment of interest, it does not amount to adding to the terms of the contract if by collateral agreement a promise to pay interest is also proved, as such an agreement is not in any way inconsistent with the terms of the written document. Were, however, a rate of interest specified and that rate were tried to be varied, the position would be different.

The main difficulty arises in the case on account of the difficulty in interpreting section 80 of the Negotiable Instruments Act. Under section 79, where interest at a specified rate is expressly made payable on a promissory note, the interest is to be calculated at the rate specified on the amount of the principal money *from the date of the instrument*; and under section 80, when no rate of interest is specified in the instrument, interest on the amount due has to be calculated at the rate of 6 per cent. per annum "from the date at which the same ought to have been paid by the party charged". It is noteworthy that in one section the legislature has expressly used the expression "from the date of the instrument", while in the other section the words are "from the date at which the same ought to have been paid". The first

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point to consider is whether the word "same" means interest or amount due thereon. On this point also there has been a conflict of opinion. The Bombay High Court in the case of *Ganpat Tukaram v. Sopana Tukaram* (1), the Lahore High Court in the case of *Khurshid Haq v. Ramditta Mall* (2) and the Patna High Court in the case of *Bishun Chand v. Babu Audh Behari Lal* (3) have taken the view that the word "same" must mean the amount of principal and not the interest. On the other hand, a learned judge of the Calcutta High Court in *Premal Sen v. Radhaballav Kankra* (4) came to the conclusion that the word "same" should mean interest. The section has been amended by Act XXX of 1926, and the words "notwithstanding any agreement relating to interest between any parties to the instrument" have been added therein.

There are difficulties in either view. If the word "same" were to refer to interest only and not to the amount, then in a case where there is neither specification of any rate of interest nor even of interest, it would be difficult to see from what date interest ought to be calculated, as there would be no date from which interest ought to have been paid, unless it were assumed that it would necessarily become payable on the date on which the principal would become payable. On the other hand, if the word "same" refers to the amount, then there may be difficulty in applying the section to a case where the principal amount is due immediately but there is a contract that interest would be payable after a fixed time, though no rate of interest is specified. If the interest is to be calculated from the date when the principal becomes payable, it would be contrary to the written contract. The matter is not free from difficulty; but we think that on the whole the word "same" should be understood to refer to the amount due on the instrument and not to the interest on that amount, because the noun "amount"

(1) (1927) I.L.R., 52 Bom., 88.

(2) A.I.R., 1928 Lah., 665.

(3) (1917) 2 Pat.L.J., 451.

(4) (1930) I.L.R., 58 Cal., 290.

was nearest to it before the amendment. It would, therefore, follow that interest is to be calculated from the date at which the amount of the principal ought to have been paid. This is a reasonable construction, because the legislature was providing for payment of interest in a case where no rate of interest is specified, and it is quite reasonable to assume that interest should be calculated from the date on which the principal sum becomes payable.

Now there is a clear distinction between (1) an amount payable immediately and (2) an amount payable on demand or an amount payable after the expiry of a fixed time after demand or after sight or after presentation. In the first case there can be no doubt that the principal amount becomes payable immediately and in such a case interest has to be charged from that date. But where the amount becomes payable only on demand or at sight or on presentation, it would be difficult to say that the amount ought to have been paid on the very date of the execution. No doubt it is not necessary for a plaintiff to make any previous demand of payment before instituting his suit on the basis of a promissory note. Such a suit cannot fail on the mere ground that no previous demand had been made. Nevertheless the amount cannot be said to have been payable until the demand is made, and in this case the demand is not considered to be made until the suit is filed. This was the view expressed in the case of *Premal Sen v. Radhaballav Kankra* (1) quoted above.

Prior to the amendment of section 80 their Lordships of the Privy Council in the case of *Ghansham Lalji v. Ram Narain* (2) had distinctly held that section 80 conferred a right on creditors to interest where no rate of interest was specified and did not take away any right to recover interest which had accrued either under the Usury Laws Repeal Act or had been acquired by contract. Subsequent to that ruling section 80 was amended

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(1) (1930) I.L.R., 58 Cal., 290.

(2) (1906) I.L.R., 29 All., 33.

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and the words "notwithstanding any agreement relating to interest between any parties to the instrument" have been added, which would make the section applicable in spite of any contrary agreement relating to interest between the parties to the instrument. There seems to be no reason why this part of the section should apply only to the rate at which interest is calculated, and not to the date from which such interest is to be calculated. It would accordingly follow that where no rate of interest is specified in a written instrument, then notwithstanding any contract to the contrary the interest is to be calculated at the rate of 6 per cent. per annum, and the date from which such interest should be calculated should be the date on which the principal amount ought to have been paid, that is, it became payable. In the present case there was in fact no proof that there was any private agreement to pay interest at any rate at all. Even if there had been one, we would have been compelled to hold that under section 80 interest should be charged from the date of the demand only. There is no proof here that any demand was made prior to the suit. Accordingly the plaintiff was not entitled to charge interest for any period prior to the institution of the suit. Since the institution of the suit the plaintiff is certainly entitled to interest at 6 per cent. per annum simple until the date of realisation.

We accordingly allow this appeal in part, and modifying the decrees of the courts below, decree the plaintiff's claim for Rs.720, together with interest on this amount at 6 per cent. per annum simple from the date of the institution of the suit till realisation. The parties will receive and pay costs in proportion to success and failure throughout.

*Before Mr. Justice Niamat-ullah and Mr. Justice Allsop*

CHHATTAR SINGH AND OTHERS (DEFENDANTS) *v.* HUKUM  
KUNWAR (PLAINTIFF)\*

1935  
*September, 4*

*Hindu law—Daughters' estate—Joint estate of two daughters—Mortgage by one daughter of her share how far effective—U. P. Land Revenue Act (Local Act III of 1901), sections 111, 233(k)—Estoppel—Equitable liability on account of benefit to estate.*

On the death of a Hindu his two daughters jointly succeeded to the estate. As the estate was at that time in the possession of others, a suit had to be filed by the daughters for recovery of possession. One of the daughters, *T*, hypothecated her half share in the estate and borrowed money required for the suit; the other daughter, *H*, was not a consenting party to the mortgage, nor was any representation made by her which might have misled the mortgagee. After the daughters' suit had succeeded and they had obtained possession, the mortgagee brought a suit on his mortgage and in execution of the decree purchased *T*'s half share in the estate. He then applied for partition of that share in the revenue court. *H* objected that the purchaser had no share inasmuch as the mortgage by *T* was invalid; *H* was directed to file a suit in the civil court to have this question of title decided, but she failed to do so and consequently her objection was disallowed and the partition was effected. Some time later *T* died, and then *H* sued the purchaser for possession of *T*'s half share on the ground that it had come to *H* by survivorship: *Held* that *H* was entitled to succeed.

Where a Hindu dies leaving two daughters, they succeed as joint tenants with a right of survivorship. The two daughters collectively are, in a legal sense, one heir to their father. If they act together they can burden the reversion with any debts contracted owing to legal necessity, but one of them acting without the authority of the other can not prejudice the right of survivorship by burdening or alienating any part of the estate. The position of daughters in this respect under the Hindu law is the same as that of widows.

As there had been no representation on the part of *H* which might have misled the other party and induced him to change his position to his prejudice, there was no reason for saying that *H* was in any way estopped from making the claim to *T*'s

\*First Appeal No. 37 of 1931, from a decree of S. Nawab Hasan, Subordinate Judge of Aligarh, dated the 19th of December, 1930.

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share by right of survivorship. The mere fact that she in some measure had benefited from the loan taken by her sister, which partly financed the litigation by which they recovered possession of the estate, was no reason for preventing her from questioning the transaction of mortgage by *T*.

The suit was not barred by the provisions of section 233(k) of the Land Revenue Act. No doubt *H* did not institute the suit in the civil court which she was directed to do; but she could not, at that time when her sister was alive, have filed any effective suit and obtained any present relief against the alienation made by the sister of her half share. The most that could be said in respect of the decision under section 111 of the Land Revenue Act was that it might be *res judicata* that *H* was not entitled to recover *T*'s share during the latter's life time; that decision did not prevent *H* from recovering the share after *T*'s death.

Messrs. *P. L. Banerji* and *S. B. L. Gaur*, for the appellants.

*Dr. K. N. Katju* and *Mr. Panna Lal*, for the respondent.

*NIAMAT-ULLAH* and *ALLSOP, JJ.*:—This is an appeal against a decree of the learned Subordinate Judge of Aligarh. It appears that one Net Ram died in the year 1886 leaving him surviving two daughters *Mst. Tejo* and *Mst. Hukum Kunwar* and a widow *Mst. Mendu*. After his death his property, now in suit, was shown in the register as being in the possession of his widow and of his two brothers, *Sewa Ram* and *Hira Singh*. Then on the 5th of October, 1887, the widow died and the two brothers continued in possession. *Mst. Hukum Kunwar* and *Mst. Tejo*, it is said, were not sufficiently well off to institute a suit for possession against the two brothers. However, eventually some money was borrowed from *Khem Singh* and a suit was instituted within limitation on the 30th of September, 1899. As a result of that suit *Mst. Tejo* and *Mst. Hukum Kunwar* came into possession of the property. We have mentioned that money was borrowed for the purposes of the suit. We refer to a mortgage executed by *Mst. Tejo* alone in favour of *Khem Singh*. It was to secure

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a debt of Rs.1,000 and hypothecated Mst. Tejo's half share in the property. A suit was instituted on the basis of the mortgage. A decree was obtained and Mst. Tejo's half share was put to sale and purchased by the mortgagee himself and by Chhattar Singh and Kewal Singh. The purchasers, having obtained a share in the property, then instituted a suit for partition in the revenue court. In the course of that suit Mst. Hukum Kunwar objected that they had no share because Mst. Tejo was not entitled to alienate the property. Mst. Hukum Kunwar was directed to institute a suit in the civil court within a certain period, but she failed to do so and consequently her objection was disallowed and the partition was effected. Some time later Mst. Tejo died and Mst. Hukum Kunwar then instituted the suit which has given rise to this appeal in order to obtain possession of Mst. Tejo's half share in the property on the allegation that it had come to her by right of survivorship. The suit has been decreed by the lower court and consequently this appeal is before us.

It will be convenient, before we go any further, to consider one point which has been raised, namely whether Mst. Hukum Kunwar was a consenting party to the mortgage by Mst. Tejo. We have been referred to some evidence, but have no hesitation in saying that it is of little value. [The evidence was then discussed.] We are consequently not prepared to hold that Mst. Hukum Kunwar was a consenting party to the alienation.

Having held that Mst. Hukum Kunwar was not a consenting party, we now have to consider a proposition of law upon which the plaintiff has relied. She says that one of the two daughters holding the estate jointly was not entitled, whether there was necessity or not, to make an alienation of any part of that estate so as to bind her sister or the other reversioners. We are satisfied that this is a true proposition of law and that the matter is concluded by authority. In the case of *Gauri Nath*



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*Kakaji v. Gaya Kuar* (1) their Lordships of the Privy Council said:—"The general law is so well settled that it scarcely requires restatement. If a Hindu dies leaving two widows, they succeed as joint tenants with a right of survivorship. They are entitled to obtain a partition of separate portions of the property so that each may enjoy her equal share of the income accruing therefrom. Each can deal as she pleases with her own life interest, but she cannot alienate any part of the corpus of the estate by gift or will so as to prejudice the rights of the survivor or a future reversioner. If they act together they can burden the reversion with any debts contracted owing to legal necessity, but one of them acting without the authority of the other cannot prejudice the right of survivorship by burdening or alienating any part of the estate."

It has been suggested in argument that one of two widows cannot alienate her share until she has obtained a partition of the property. This argument is based on the analogy of a Hindu joint family. We do not consider that the analogy is a true one. There is nothing in the statement of the law which we have quoted to justify the conclusion that the right of dealing with a share of the property arises only after partition and there is no reason why any such distinction should be made. In a Hindu joint family the shares are fluctuating just as members of the family may fluctuate. In a joint estate such as that held by two or more widows there can be no question of fluctuation except in so far as if some one of the joint tenants dies her share will go by survivorship to the others and may increase their shares. The shares cannot at any time be decreased during the lives of the persons holding them.

There has also been a suggestion that the law in respect of daughters is not the same as that in respect of widows. In the case of *Aumirtolall Bose v. Rajoneekant Mitter* (2) their Lordships of the Privy Council

(1) (1928) 26 A.L.J., 1174.

(2) (1875) 2 I.A., 113(127).

have quoted with approval a proposition laid down by Mr. JUSTICE MORGAN, namely "that, like widows, the two daughters collectively were, in a legal sense, one heir to their father". The reference was to daughters holding a Hindu father's estate. It seems to us that this is quite conclusive upon the question whether there is any difference between the position of widows and the position of daughters in this respect. We are satisfied that the position is the same and consequently that one of the daughters in this case could not alienate any part of the joint estate to the prejudice of the other.

There are certain subsidiary arguments raised by the appellant. In the first place it is suggested that whatever other reasons there may be for dismissing the appeal, yet in this particular case the plaintiff was not entitled to succeed because she had benefited by the loan taken by her sister and that consequently she could not question the validity of the mortgage by which the loan was secured. We cannot see that there is any force in this argument. There is absolutely no reason for saying that Mst. Hukum Kunwar was in any way estopped from raising the question which she did raise that she was entitled to the property. It is not shown that she attempted to deceive or did deceive anybody, so as to induce him to change his legal position. The mere fact that she may in some measure have benefited from the loan taken by her sister, in that she obtained her share in the course of litigation which may have been partly financed from the money so borrowed, is no reason for preventing her from questioning the transaction.

Another argument is that the plaintiff's claim was barred by the provisions of section 233 (k) of the United Provinces Land Revenue Act. We have already mentioned that Mst. Hukum Kunwar at the time of the partition raised the question whether Mst. Tejo was entitled to transfer her share of the property to Khem Singh. It is true that she did not institute a suit in

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the civil court as she was directed to do, but we do not see what suit she could have instituted. At that time her sister Mst. Tejo was alive and consequently she was entitled to deal with her own share of the property and it would not have been possible for Mst. Hukum Kunwar to obtain any relief against that share. The position was quite different after Mst. Tejo died. The most that we can hold in respect of the decision under section 111 of the Land Revenue Act is that it might be *res judicata* that Mst. Hukum Kunwar was not entitled to recover the share of Mst. Tejo during Mst. Tejo's life time. It is certainly not justifiable to say that the decision in the partition suit prevented Mst. Hukum Kunwar from recovering the share after Mst. Tejo's death.

This concludes all the questions which have been raised by the appellant. We are satisfied that there is no force in this appeal and we dismiss it with costs.

## PRIVY COUNCIL

GOPI KRISHNA KASAUDHAN *v.* MUSAMMAT JAGGO  
AND ANOTHER

J. C.\*  
1936  
April, 28

[On appeal from the High Court at Allahabad]

*Hindu law—Marriage—Mitakshara school—Vaishyas—Abandonment of wife—Right of abandoned wife to re-marry—Custom—Marriage in sagai form—Intermarriage in sub-castes—Validity of marriage of Kasaudhan with Agrahri woman.*

The Shastras do not contain any injunction forbidding marriage between persons belonging to different sub-divisions of the same *Varna* nor is there any general principle which can be invoked in support of such prohibition. A marriage between a Kasaudhan and an Agrahri woman is, therefore, not invalid merely because they belong to different sub-castes.

Where it has been established that by custom the abandonment of a wife by her husband dissolves the marriage tie, the woman abandoned may, during the life of the husband who has abandoned her, contract a valid marriage with another in the *sagai* form.

*Inderun Valungypooly Taver v. Ramasawmy Pandia Talaver* (1), and *Ramamani Ammal v. Kulanthai Natchear* (2), referred to.

APPEAL (No. 34 of 1934) from a judgment of the High Court (February 3, 1933) varying, but not on the question here, a decree of the Additional Subordinate Judge of Gorakhpur (December 23, 1929).

Musammat Jaggo, by birth an Agrahri, was married when young to one Baijnath, an Agrahri. On his death, she married in the *sagai* form Baijnath's younger brother Sheonath. Sheonath abandoned her and she then, again in the *sagai* form, contracted a marriage with one Nikku Lal, a Kasaudhan, by whom she had a son Kishan. The plaintiff appellant was admittedly a legitimate son of Nikku Lal and he claimed the entire estate of his deceased father, Nikku Lal, alleging that Musammat Jaggo was a mistress and not the lawful wife of Nikku Lal and that her son Kishan was illegitimate. It was

\*Present: Lord BLANESBURGH, Sir SHADI LAL and Sir GEORGE RANKIN.

(1) (1869) 13 Moo. I.A., 141.

(2) (1871) 14 Moo. I.A., 346.

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admitted that both Agrahris and Kasaudhans were Vaishyas.

The Subordinate Judge held that there was no instance of a marriage between members of the sub-castes in question, that intermarriage between sub-castes of a primary caste was not prohibited and that the plaintiff, on whom the onus lay, had failed to prove any custom prohibiting marriage between members of the two sub-castes in question, that the Hindu law permitted the re-marriage of an abandoned wife, that a marriage in *sagai* form had been contracted between Musammat Jaggo and Nikku Lal, that this marriage was valid and their son Kishan was legitimate.

These findings were confirmed by the High Court.

1936. January 16, 17, 20, 23. *Parikh*, for the appellant: There is no instance of a marriage between these sub-castes. Custom is not proved and the question becomes one of Hindu law.

[SIR SHADI LAL: The onus is on the person who says two persons cannot marry to prove a prohibition by statute, custom or personal law.]

There are concurrent findings of the fact that a marriage in *sagai* form was celebrated. The question is whether that was a lawful marriage. There is no divorce in Hindu law. Abandonment would not allow a woman of a twice-born caste to re-marry while her husband was alive. The case is different among Sudras. The *sagai* marriage is limited to the levirate. Reference was made to "Tribes and Castes of the North-Western Provinces and Oudh" by Crooke, Volume III, page 165 and Volume I, page 33, and to *Ramamani Ammal v. Kulanthai Naichear* (1). Customs of one caste or sub-caste cannot be applied to another. Disabilities must be determined with reference to a particular caste. Customs must be construed strictly: *Hurpurshad v. Sheo Dyal* (2). The rule in Ghose's Hindu Law (3rd edition), page 837, refers to Sudras. Reference was made

(1) (1871) 14 Moo. I.A., 346.

(2) (1876) 3 I.A., 259(285).

to *Sri Ram v. Inchi* (1), *Bhola Umar v. Kausilla* (2), Mayne's Hindu Law, paragraph 94, and *Natha Nathuram v. Mehta Chotalal* (3). Generally castes and sub-castes are endogamous. There is no case in which a marriage of members of two separate castes, either among Sudras or twice-born, has been held valid. The dicta in *Pandaiya Telaver v. Puli Telaver* (4) at page 483 of the report is obiter: *Inderun Valungypooly Taver v. Ramasawmy Pandia Talaver* (5) at pages 157-159.

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The respondents were not represented.

The judgment of the Judicial Committee was delivered by Sir SHADI LAL:

This appeal raises a question which has an important bearing upon the law of marriage governing the Hindu community. It arises out of a dispute relating to the estate of one Nikku Lal, who died in July, 1923. Nikku Lal was a member of the Vaishya caste of Gorakhpur in the United Provinces of India, and followed the Mitakshara school of the Hindu law.

The plaintiff Gopi Krishna, who is the appellant before their Lordships, is admittedly Nikku Lal's legitimate son; and his right to a moiety of the estate is no longer in dispute. He, however, claims the entire estate on the ground that the defendant, Sri Kishan, is not a legitimate son of Nikku Lal, and, therefore, has no interest in the property left by him.

That Sri Kishan was born of a woman called Jaggo is not disputed, but the question is whether she was, at that time, a lawfully wedded wife of Nikku Lal. It appears that she was originally married to one Baijnath while she was a minor; and that, after his death, she married his younger brother Sheonath. The second marriage, however, did not prove to be a happy one, as Sheonath had another wife who naturally disliked the advent of a rival. There were consequently quarrels

(1) (1913) 11 A.L.J., 711.

(2) (1932) I.L.R., 55 All., 24.

(3) (1930) I.L.R., 55 Bom., 1.

(4) (1863) 1 Mad. H.C.R., 478(483).

(5) (1869) 13 Moo. I.A., 141 (157-9).

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between the two wives, and the husband, in order to put an end to the trouble, abandoned the second wife.

Thus deserted, Jaggo entered into a matrimonial alliance with Nikku Lal by performing the ceremony of *sagai*. Now *sagai* is an informal ceremony of marriage, and the courts below have concurred in holding, not only that she performed the ceremony of *sagai* with Nikku Lal, but also that it is recognized as a valid ceremony in the case of a re-marriage. This decision is not challenged before their Lordships, but it is urged that the lady could not contract a valid marriage during the continuance of her marriage with Sheonath. It is obvious that she could not marry Nikku Lal if she was still Sheonath's wife. The defendants, however, invoke a custom which recognizes and sanctions the re-marriage of a woman who has been abandoned by her husband. The learned Judges of the High Court have, upon an examination of the evidence, endorsed the conclusion of the trial Judge that Jaggo had been deserted by Sheonath before she married Nikku Lal, and that, by a custom applicable to the parties, such abandonment or desertion of the wife by her husband dissolves the marriage tie and sets her free to contract another marriage. Their Lordships see no reason for departing from the general rule of practice that they will not make a fresh examination of facts for the purpose of disturbing concurrent findings recorded by two courts in India.

Then, if the existence of Sheonath did not invalidate the marriage of Jaggo with Nikku Lal, was it invalid on any other ground? It is contended on behalf of the appellant that, as the parties to the marriage belonged to two different sub-castes of Vaishyas, the man being a Kasaudhan and the woman an Agrahari, they could not, under the Hindu law, enter into a lawful marriage with each other. Their Lordships are not aware of any rule of Hindu law, and certainly none has been cited, which would prevent a marriage between persons belonging to two different divisions of the same caste. Indeed,

there are several decided cases which have upheld such marriages. It is sufficient to refer, in this connection, to two judgments of the Board, *Inderun Valungypooly Taver v. Ramasawmy Pandia Talaver* (1) and *Ramamani Ammal v. Kulanthai Natchear* (2).

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It is true that both these cases, as well as the judgments of the High Courts which are founded upon them, relate to the Sudra caste; and the argument advanced by the learned counsel for the appellant is that they cannot establish the validity of a marriage between persons belonging to two sub-castes of a twice-born class such as the Vaishyas. There can, however, be no doubt that the texts of the Hindu law do not enunciate any rule prohibiting the union in marriage of persons belonging to different divisions of the same caste, and not a single case has been quoted in which such a marriage has been declared to be invalid.

Their Lordships do not think that the matter requires any elaborate discussion. Put briefly, the position is this. The Shastras dealing with the Hindu law of marriage do not contain any injunction forbidding marriages between persons belonging to different divisions of the same *Varna*; and neither any decided case nor any general principle can be invoked which would warrant such a prohibition. Then, what is it upon which the appellant, on whom the onus rests, can sustain the invalidity of the marriage? It is said that marriages between members of different sub-castes of the same caste do not ordinarily take place, but this does not imply that such a marriage is interdicted and would, if performed, be declared to be invalid. Indeed, there is, at present, a tendency to ignore such distinctions, if they ever existed. There exists no doubt a disinclination to marry outside the sub-caste, inspired probably by a social prejudice; but it cannot be seriously maintained that there is any custom which has acquired the force of law. It is, however, unnecessary to pursue the subject, as in the courts below

(1) (1869) 13 Moo. I.A., 141.

(2) (1871) 14 Moo. I.A., 346.



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no such custom was set up or proved as would render the marriage invalid.

For these reasons their Lordships hold the marriage to be valid, and they will humbly advise His Majesty that the judgment and the decree pronounced by the High Court should be affirmed and this appeal be dismissed. There will be no order as to costs, as the respondents are not represented before them.

Solicitors for the appellant: *Hy. S. L. Polak & Co.*  
The respondents were not represented.

### REVISIONAL CRIMINAL

*Before Mr. Justice Ganga Nath*

EMPEROR *v.* MUNSHI RAM AND ANOTHER\*

1935

*September, 6*

*Child Marriage Restraint Act (XIX of 1929), sections 5, 6—  
What section applicable to the parents performing or conducting child marriage—Question of validity or of consummation of the marriage does not arise.*

A marriage between a girl of over 14 years of age and a boy of less than 18 years of age was performed and conducted by their respective fathers. Upon their prosecution under sections 5 and 6 of the Child Marriage Restraint Act, pleas were taken that there was no valid marriage at all as the parties belonged to the same *gotra*, that *gauna* ceremony had not been performed yet, and that the girl not being a "child" as defined in the Act, her father could not be convicted under the Act. *Held—*

(1) That the marriage ceremony having been performed, no question of the validity or the invalidity of the marriage, or of the consummation or absence of consummation thereof, could arise under the Child Marriage Restraint Act; such questions were beyond the scope of that Act.

(2) Section 5 of the Act deals with the persons who perform, conduct or direct any child marriage, and the convictions of the two fathers under that section was valid inasmuch as in the case of Hindu marriages the fathers do perform, conduct and direct the marriage ceremonies. The section is wide enough to cover the cases of the father of the bridegroom and that of the

\*Criminal Revision No. 712 of 1935, from an order of I. B. Mundle, Sessions Judge of Saharanpur, dated the 13th of July, 1935.

bride, and the fact that the bride was not a "child" does not affect the question of her father's liability for the child marriage as it was he who gave his daughter in marriage and took part in the marriage ceremonies.

(3) Section 6 of the Act provides for the offence in cases where a minor himself contracts a child marriage. The present case not being such a case, the convictions of the two fathers under that section were illegal.

Messrs. *Saila Nath Mukerji* and *Shri Ram*, for the applicants.

The Assistant Government Advocate (Dr. M. *Waliullah*), for the Crown.

GANGA NATH, J.:—This is an application in revision by Munshi Ram and Ram Chander against their convictions and sentences under sections 5 and 6 of the Child Marriage Restraint Act (XIX of 1929) which was confirmed in appeal by the learned Sessions Judge of Saharanpur. The daughter of Ram Chander has been married to the son of Munshi Ram. The age of the girl is over 14 years and therefore she is not a child as defined in the Act. The age of the boy was under 18 years and therefore he is a child. A child as defined in the Act means a person who, if a male, is under 18 years of age, and, if a female, is under 14 years of age. It is not denied that the marriage has been performed, but no *gauna* ceremony has been performed as yet. The fact that the *gauna* ceremony has not been performed as yet does not affect the performance of the marriage, which is complete as soon as the ceremony of the marriage is performed. Consummation is not a part of the marriage ceremony.

It has been urged by the learned counsel for the applicants that inasmuch as both the parties to the marriage belonged to the same *gotra*, the marriage was not valid. The Act aims at and deals with the restraint of the performance of the marriage. It has nothing to do with the validity or invalidity of the marriage. The question of the validity or invalidity of the marriage is beyond the scope of the Child Marriage Restraint Act. Marriage is

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performed by the performance of certain ceremonies, which depend on the race and religion of the parties who enter into marriage. As already stated, the marriage ceremony has been admittedly performed.

It was contended by the learned counsel for the applicants that the convictions under sections 5 and 6 were not legal. He urged that section 5 relates to the priests and strangers and not to the parents. He relied on *Ganpatrao Devaji v. Emperor* (1). There it was held that section 5 contemplates strangers and excludes those who are punishable under section 3 or section 4 and section 6, that is the bridegroom and the parent or guardian. It was observed: "It is manifest that section 5 is worded in general terms without specifying the particular class of persons intended to be covered by it, whereas section 6 is directed against particular persons, namely a parent or a guardian of a minor who contracts a child marriage. The question is whether the legislature intended to impose a double penalty on the parent or guardian." Sections 5 and 6 deal with different offences. Section 5 deals with the persons who perform, conduct or direct any child marriage. Section 6 provides for the offence in case where a minor himself contracts a child marriage. It is only in the case a minor contracts child marriage that any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnized, or negligently fails to prevent it from being solemnized, shall be punishable. Section 5 deals with the cases in which the marriage is not contracted by a minor. Section 5 lays down: "Whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both, unless he proves that he had reason to believe that the marriage was not a child marriage." It was urged by the learned

(1) A.I.R., 1932 Nag., 174.

counsel for the applicants that inasmuch as the daughter of Ram Chander applicant was not a child, he could not be convicted. Section 5 is wide enough to cover the case of the fathers of both the bridegroom and the bride. In the case of Hindu marriages it cannot be said that the father of the bridegroom or the bride does not perform or direct the marriage. It is generally the father or the guardian who arranges for the marriage of the boy and takes the marriage party to the house of the bride. It is the father of the bride who takes part actually in the performance of the marriage ceremonies, as it is he who gives his daughter in marriage. Therefore, it cannot be said that Ram Chander did not perform or direct the marriage. There can therefore be no question as regards the legality of the conviction of both the applicants under section 5.

As regards their convictions under section 6, as already stated, it applies to the case in which the child marriage is contracted by the minor. In this case, as the marriage was not contracted by the minor, section 6 does not apply and consequently the convictions of the applicants under this section cannot stand. It is therefore ordered that the convictions and sentences of the applicants under section 5 of the Child Marriage Restraint Act be confirmed but their convictions under section 6 be set aside. As only one sentence has been passed for conviction under both the sections, no order for the setting aside of any sentence for conviction under section 6 is made.

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## MISCELLANEOUS CIVIL

1935  
September,  
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*Before Sir Shah Muhammad Sulaiman, Chief Justice*

## IN THE MATTER OF AN ADVOCATE\*

*Bar Councils Act (XXXVIII of 1926), sections 12, 19(2)—Rules made by High Court under section 12 of Bar Councils Act, rule 11—Bench of three Judges considering Bar Council Tribunal's finding—Opinion of majority to prevail and be valid—Letters Patent, clauses 8, 27, 35—Jurisdiction.*

When findings of Bar Council Tribunals come up for consideration before a Bench of three Judges, in accordance with rule 11 of the rules framed by the High Court under section 12 of the Bar Councils Act, the opinion of the majority of the Judges prevails and is the valid judgment; unanimity of the Judges constituting the Bench is not necessary for the reversal of the finding of the Bar Council Tribunal.

Clause 8 of the Letters Patent confers jurisdiction on the High Court to remove or suspend advocates, whereas section 10 of the Bar Councils Act lays down the procedure according to which such jurisdiction should be exercised; the Bar Councils Act has not in itself conferred a jurisdiction on the High Court replacing the previous jurisdiction. As the jurisdiction to deal with advocates still vests in the High Court under clause 8 of the Letters Patent, and the High Court in exercising that jurisdiction is performing a function directed by the Letters Patent, its Benches are therefore governed by the rule as to the opinion of the majority mentioned in clause 27 of the Letters Patent. No doubt under clause 35 of the Letters Patent the provisions of the Letters Patent can be modified by subsequent enactments in India; but there is nothing in the Bar Councils Act or in any rules made thereunder which has expressly abrogated, or has impliedly repealed by providing something inconsistent, the provision of clause 27 that the opinion of the majority of the Judges hearing the case should prevail. Section 19(2) of the Bar Councils Act makes it clear that the Letters Patent shall be deemed to have been repealed only in so far as they are inconsistent with the Act or any rules made thereunder. Indeed the fact that the Act is silent, and so are the rules, on the point would suggest that this provision of the Letters Patent has necessarily been retained. The provisions of clause 27 relating to the powers of single Judges and Division Courts are of

\*Application in Miscellaneous Case No. 147 of 1935.

general application, and unless there is something in the Bar Councils Act—which there is not—which would curtail those powers, they must be considered to be still in force.

Messrs. *K. Verma, A. P. Panday, S. N. Verma, S. N. Misra and Lalta Prasad*, for the applicant.

The Government Advocate (*Mr. Muhammad Ismail*), for the Crown.

SULAIMAN, C.J.:—This is an application by an advocate who by an order of the majority of the Judges constituting a Full Bench has been suspended for a period of six months, and who prays that the High Court be pleased to hold that the said order is *ultra vires* and the Bar Council Tribunal's findings should be deemed to be operative and subsisting.

The learned advocate for the applicant has to concede that on the judicial side the Chief Justice would, of course, have no jurisdiction to hear an appeal from the decision of a Bench of three Judges. He is, therefore, compelled to urge that my authority has been invoked on the administrative side, and that the object of the application is that I may, if of the opinion that the order of the majority of the Judges is *ultra vires*, direct the office not to proceed under section 10 of the Bar Councils Act and that no record of this punishment be entered against his name in the roll of advocates.

The main contention urged on behalf of the advocate is that the finding of the Bar Council Tribunal can be reversed by a Bench of the High Court only when all the Judges constituting the Bench are unanimous, and that if a single Judge dissents, the finding cannot be set aside. The argument is that prior to the passing of the Bar Councils Act jurisdiction to deal with advocates for misconduct was conferred by clause 8 of the Letters Patent, and therefore the procedure laid down in clause 27 providing for the opinion of the majority to prevail governed such cases; but the power is now exercised under the provisions of the Bar Councils Act, which contains no section laying down that the opinion of the

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majority alone will be sufficient. It is pointed out that in some other Acts, like the Stamp Act, section 57(2), the Income-tax Act, section 66A, and the Indian Divorce Act, section 17, there are specific provisions that the opinion of the majority of the Judges shall prevail, whereas there is a significant omission of any such provision in the Bar Councils Act. It is accordingly contended that on the analogy of awards of arbitrators, who, in the absence of an agreement to the contrary, must be unanimous, the High Court has jurisdiction to reverse the finding of the Bar Council Tribunal when there is unanimity among all the Judges, and not otherwise.

It has, of course, to be conceded that prior to the 1st of June, 1928, when the Bar Councils Act came into force, this High Court was empowered under clause 8 of the Letters Patent to remove or suspend from practice on reasonable cause an advocate, and that, under clause 27, when the High Court was proceeding in such a matter it must be deemed to have been performing a function directed by the Letters Patent within the meaning of clause 27, and that therefore the opinion of the majority of the Judges had to prevail.

The question for consideration is whether the provisions of clause 27 of the Letters Patent, which are of general application and deal with powers of single Judges and Division Courts, have been completely abrogated or repealed so far as proceedings under the Bar Councils Act are concerned.

No doubt under clause 35 of the Letters Patent the provisions of the said Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council, etc., and that therefore the provisions of the Letters Patent can be modified by a subsequent enactment. The question, however, is whether the Bar Councils Act has modified this part of the provision of clause 27.



The argument based on an omission of all reference to the opinion of the majority in the Bar Councils Act, as compared to the provisions of other enactments mentioned above, has in my view no force. These Acts themselves provided that the cases arising under them should come up for decision before a Bench of not less than three or not less than two Judges. That is to say, a minimum constitution of the Bench empowered to deal with such cases was prescribed, and therefore the legislature felt the necessity of providing further that the opinion of the majority should prevail. The Bar Councils Act, on the other hand, does not contain any provisions specifying that cases under the Act should be disposed of by even more than one Judge. It is on this ground that no necessity was felt to provide what is to happen when there is a difference of opinion.

Section 108 of the earlier Government of India Act preserved the jurisdictions, powers and authority of the High Court as were vested in it at the commencement of that Act. That Act, therefore, did not in itself repeal clause 27 of the Letters Patent. There is a similar provision in section 223 of the Government of India Act, 1935. Under both these sections the High Court has been expressly empowered to make rules for regulating the practice of the Court. On the other hand, section 12 of the Bar Councils Act refers to the framing of rules to prescribe the procedure to be followed by Tribunals and by District Courts, and contains no reference whatsoever to the rules that may be framed for prescribing the procedure to be followed in the High Court itself. It is obvious, therefore, that the Bar Councils Act has left the jurisdiction of the High Court to frame rules for regulating its own procedure quite intact, except to the extent expressly mentioned therein.

It is by rule 11 framed by the High Court under section 12 of the Bar Councils Act that it is provided that the findings of Bar Council Tribunals should come up for consideration before a Bench of three Judges. This

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rule, in my opinion, should more appropriately have been framed under section 108 of the Government of India Act and possibly also under section 122 of the Code of Civil Procedure; but certainly not under section 12 of the Bar Councils Act. I would have no hesitation in holding that the High Court has power to frame a special rule prescribing that when the finding is put up before a Bench of three Judges for consideration, if the Judges are divided in opinion, the view of the majority should prevail.

No such rule, however, exists at present, and it is a matter for consideration whether it necessarily follows that the findings have got to be accepted unless there is unanimity. The answer must depend on the interpretation of the relevant provisions of the Bar Councils Act. The preamble indicates the intention of the legislature to consolidate and amend the law relating to legal practitioners entitled to practise in such courts. There is no section which confers special jurisdiction on High Courts for dealing with cases of misconduct. Nor is there anything in the body of the Act or in the schedule appended thereto which would suggest that clauses 8 or 27 of the Letters Patent have been expressly repealed. The repeal can take place only by a necessary implication, if such a position were tenable. Now the distinction between clause 8 of the Letters Patent and section 10 of the Bar Councils Act is that under the former the High Court is "empowered to remove or to suspend from practice, on reasonable cause, . . . advocates", which undoubtedly confers jurisdiction on the High Court, whilst section 10 merely provides that "The High Court may, in the manner herein provided, reprimand, suspend or remove from practice any advocate of the High Court whom it finds guilty of professional or other misconduct." It seems to me that clause 8 of the Letters Patent confers jurisdiction to remove or suspend advocates, whereas section 10 of the Bar Councils Act lays down the procedure according to which such jurisdiction should be

exercised. In the matter of procedure the Bar Councils Act, being a later enactment, must prevail. But as I read the various provisions of the Bar Councils Act I am unable to hold that the Bar Councils Act has in itself conferred a jurisdiction on the High Court replacing the jurisdiction which had previously been conferred by the Letters Patent.

Section 19(2) of the Bar Councils Act clearly provides that when sections 8 to 16 come into force in respect of any High Court, this Act shall have effect in any such court "notwithstanding anything contained in such Letters Patent, and such Letters Patent shall, *in so far as they are inconsistent with this Act or any rules made thereunder*, be deemed to have been repealed." Thus the entire provisions of the Letters Patent have not been repealed, but only such provisions of it must be deemed to have been repealed as are inconsistent with the provisions of this Act or any rules made thereunder.

It seems to me that the jurisdiction to deal with advocates still vests in the High Court under clause 8 of the Letters Patent, and the High Court in exercising that jurisdiction is performing a function directed by the Letters Patent, and its Benches are therefore governed by the rule as to the opinion of the majority mentioned in clause 27. There is nothing in the Bar Councils Act or in any rules made thereunder which is inconsistent with the provision that the opinion of the majority of the Judges hearing the case should prevail. Indeed the fact that the Act is silent and so are the rules would suggest that the provisions of the Letters Patent have necessarily been retained. As already pointed out, the provisions of clause 27 relating to the powers of single Judges and Division Courts are general in their nature, and unless there is something in the Bar Councils Act (which there is not) which would curtail that power, they must be considered to be still in force. When the legislature left it to the High Court to frame rules, including a rule that such cases should be heard by a

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single Judge only, it could not have necessarily contemplated that there should be perfect unanimity before the finding of the Bar Council Tribunal is reversed. Nor can it be said that the High Court, when it framed the rules regulating its own practice and directing that cases of this kind should be put up before a Bench of three Judges, necessarily intended to lay down that it would have power to interfere with the finding of the Bar Council Tribunal only if the Judges unanimously agreed. As clause 27 contains the general provision which prevails in all cases which are not governed by special provisions of other enactments like section 98 of the Code of Civil Procedure, the necessary inference is that the intention at the time of the framing of the rules was to adhere to the existing procedure and not to depart from it without providing for some new rule of practice in its place. I am, therefore, of the opinion that it is impossible for me to hold that the order passed by the majority of the Judges on the 20th of August, 1935, was altogether *ultra vires* and that it is my duty to direct the office not to give effect to it. On the contrary, I hold that there was no option but to direct that the opinion of the majority shall prevail.

Under the rules of this Court an advocate who has been suspended has a right of appeal to His Majesty in Council. The proper course for the applicant, if he feels aggrieved and considers that the decision was wrong, is to appeal to their Lordships of the Privy Council and not approach me as the Chief Justice.

The application is accordingly dismissed.

## APPELLATE CIVIL

*Before Sir Shah Muhammad Sulaiman, Chief Justice,  
and Mr. Justice Bennet*

*And on a reference*

*Before Mr. Justice Bajpai*

PIARE LAL AND OTHERS (PLAINTIFFS) *v.* SONEY LAL  
AND ANOTHER (DEFENDANTS)\*

1935  
May, 9  
September,  
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*Agra Tenancy Act (Local Act III of 1926), sections 24, 25—  
Occupancy tenant—Succession—Hindu widow succeeding to  
tenancy during Tenancy Act II of 1901—Widow dying after  
present Act came into force—Interpretation of statutes—  
Intention, assumption of continuity—Practice and pleading—  
New plea in second appeal—Agra Tenancy Act, section 273—  
Scope of court in deciding issue referred.*

*Held (per SULAIMAN, C.J., and BAJPAI, J.: BENNET, J., contra),*  
that where a Hindu occupancy tenant died while the Tenancy  
Act II of 1901 was in force and was succeeded by his widow,  
and the widow died after the coming into force of the Tenancy  
Act III of 1926, the succession would be governed by sub-sec-  
tion (2), and not sub-section (1), of section 25 of the Tenancy  
Act III of 1926; and a person who was the nearest collateral  
male relative (in the male line of descent) of the last male occu-  
pancy tenant and who shared in his cultivation at his death  
would not be entitled to succeed, on the death of the widow,  
under section 24 of the Tenancy Act III of 1926 or otherwise.

Separate provisions for succession to male and to female  
tenants, which did not exist in the Tenancy Act II of 1901,  
have for the first time been made by sections 24 and 25 of the  
present Tenancy Act III of 1926. Section 25 deals with succes-  
sion to female tenants, and the presumption is that the rules  
of succession laid down in it are intended to be exhaustive.  
Sub-section (1) of section 25 contains a group of specified classes  
of female tenants, and sub-section (2) is the residuary sub-  
section including all the rest, except female statutory tenants  
who are dealt with by sub-section (3). Sub-section (2) must,  
therefore, apply to a female occupancy tenant unless she can  
be brought within the purview of sub-section (1).

\*Second Appeal No. 1405 of 1931, from a decree of Raghunath Prasad,  
Subordinate Judge of Mainpuri, dated the 25th of August, 1931, confirming a  
decree of N. U. Alvi, Munsif of Mainpuri, dated the 19th of May, 1931.

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The phrase "under section 24" in the clause, "who has inherited an interest in a holding under section 24", in sub-section (1) of section 25 is an adverbial phrase modifying the verb "has inherited"; the clause, therefore, refers to a female tenant who inherits under section 24 of the present Act, i.e. after the coming into force of that Act. Further, the verb "dies", which has been used in all the three sub-sections of section 25, can not and should not be construed to mean "had died before the Act came into force". A widow who inherited an occupancy tenancy before the coming into force of the present Act could not, therefore, come within sub-section (1) of section 25, and therefore sub-section (2) must necessarily apply to her; accordingly on the death of such widow the collateral heirs of her deceased husband are altogether excluded.

Even if the phrase be taken to be an adjectival phrase it would qualify the noun "interest" and the meaning would be an interest acquired under section 24. The meaning of the clause could not be "an interest referred to or recognized in section 24", unless new words were interpolated in the section, and for this there was no justification. The section must be interpreted as it stands, by giving the words their natural meaning, and without putting a constrained interpretation on them on the assumption that the legislature intended to leave the matter of inheritance to a widow untouched and exactly as it was under the previous Tenancy Act. A purely arbitrary rule of succession to tenancies was introduced into the previous Tenancy Act; extensive changes have been made therein in many respects in the present Tenancy Act, and the present rule of succession is also purely arbitrary; there is no reason to imagine that the legislature must have intended that in the matter of succession to a widow there should be no change. In these circumstances the natural meaning of the words must prevail, whatever may be the general considerations as to what the legislature was minded or was likely to do.

There is no ground for thinking that the legislature has classified female tenants into two groups, namely those who have limited interest and those who have full interest; no such classification is to be found in section 25.

A female heir of an occupancy tenant is herself an occupancy tenant, just as much as a female who herself, for the first time, acquires an occupancy tenure.

Where a suit for ejectment was brought by a zamindar against a person in possession of an occupancy holding who was alleged not to have heritable rights to it upon the death of the last holder, a widow, and there was an admission by the defend-

ant of the plaintiff's allegation that the widow had inherited the holding from her husband who had been the occupancy tenant, and the plea of the defendant amounted to a claim to succeed on the ground of being the nearest collateral who had shared in the cultivation of the husband, and there was no proper plea regarding any claim to succeed on the ground of having been a co-tenant and joint owner with the husband:

*Held*, further, with reference to the pleadings in the case, that it was not open to the defendant, in second appeal, to have the case sent back for a finding upon such a claim, nor was it open to the revenue court, in deciding an issue on the plea of tenancy referred to it under section 273 of the Tenancy Act, to come to a finding of joint ownership in favour of the defendant, as no such plea had been taken by the defendant.

[*Per* BENNET, J.:—The word “dies” in section 24 of the Tenancy Act III of 1926 is used in a perfectly general sense and is not limited to death occurring after that Act came into force. The section means that the order of succession laid down therein is to apply whenever the question arises during the time that the Act is in force, independently of the time of death. This section alone is sufficient to govern the succession to the male occupancy tenant, and to his widow after her death or re-marriage. Where a widow succeeds to an occupancy tenancy she gets the same kind of interest, namely “till her death or re-marriage”, whether the succession be under section 22 of the Tenancy Act II of 1901 or section 24 of the Tenancy Act III of 1926. A widow who succeeded “till death or re-marriage” under Act II of 1901 continues with such interest, so limited, under Act III of 1926. If the widow dies while Act II of 1901 is in force, then on her death the succession goes to the classes mentioned below her in section 22 of the Act; similarly, if she dies while Act III of 1926 is in force, then on her death the succession goes to the classes below class II mentioned in that Act.

[Section 25(2) of the present Act is intended to provide for the succession to female tenants who had themselves acquired the tenancy, e.g. rights of occupancy by 12 years' cultivation. To distinguish their case provision was made in section 25(1) for female tenants who inherited an interest in a holding from male tenants, and reference was made to section 24. Upon a correct interpretation of the language of section 25(1), it is not confined only to a female who has inherited since the present Act came into force. The phrase “under section

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24" does not modify the word "inherited"; and the meaning of the clause is "an interest which can be held under section 24", and one of the interests recognized by section 24 is that of the "widow till her death or re-marriage".

[Sub-sections (1) and (2) of section 25 mean to distinguish two classes of female tenants, (a) those who have taken by succession to males and who have only a limited interest and from whom as a stock the holding does not devolve, and (b) those who themselves acquired occupancy rights and from whom the holding does devolve.

[The pleadings in the written statement could be fairly taken to include a plea of co-tenancy and joint ownership. The revenue court was entitled to come to a finding of co-tenancy in favour of the defendant, on the pleadings, and on the issue referred to it. If the defendant was a co-tenant he would succeed under section 26 of the present Act.]

Mr. *Haribans Sahai*, for the appellants.

Mr. *Baleshwari Prasad*, for the respondents.

BENNET, J.:—This is a second appeal by the plaintiffs whose suit for possession has been dismissed by the two lower courts. The plaint set out that the plaintiffs are co-sharers of one half zamindari share and defendant No. 3 is the co-sharer of the other half share and also the lambardar in a mahal; that Debi Prasad was an occupancy tenant who died "about two years" before the plaint (dated 8th November, 1927), leaving no issue, and his widow Mst. Champa Kunwar became occupancy tenant for her life; that she died in July, 1927, and as the holding was unclaimed, plaintiffs and defendant No. 3 became entitled to get possession as zamindars; that Soney Lal defendant No. 1 and Ganga Sahai defendant No. 2 were collaterals of Debi Prasad who did not share in his cultivation, and that they entered into possession of his holding with the connivance of the lambardar defendant No. 3, who secretly received Rs. 200 as nazrana; that defendant No. 3 dishonestly instituted suit No. 195/56 of 1927 against Soney Lal and others in the revenue court for possession, and did not produce evidence and got the suit dismissed with a decree that defendants Nos. 1 and 2 had been joint in cultivation



with Debi Prasad and were his collaterals and therefore succeeded his widow as occupancy tenants. The plaint therefore asked for a declaration that this decree of the revenue court, dated October 7, 1927, was without effect against the plaintiffs and that they should be put into possession and receive mesne profits. Ganga Sahai defendant No. 2 died during the suit and his brother Soney Lal defendant No. 1 pleaded that the civil court had no jurisdiction, that the plaintiffs had full knowledge of the suit for ejectment in which there was no fraud or collusion and that the decree acted as *res judicata*. The rights of defendant No. 1 in the two plots were set out in a single paragraph of the additional pleas, as follows:

"4. *Muddaileh mujib wo Ganga Sahai numberan nizai men, jo ke maurusi unke hain, ba-maujudgi Debi Prasad uske (sath), aur bad wafat Debi Prasad ke uski bewa Musammat Jumna Kuer (ke) sharik kasht rahe, aur numberan nizai ko unke shirkat men chain taraddud karte rahe. Bayan muddaiyan khilaf uske mehz ghalat hai.*" One of the questions for decision in this case is whether this pleading must be limited to a claim that defendants 1 and 2 were persons who had no rights in the holding during the life time of Debi Prasad but who were merely permitted by him to share in his cultivation and that Debi Prasad was the sole occupancy tenant, but that after the death of Debi Prasad and of his widow these defendants have a right to succeed to the occupancy holding under section 22 of Act II of 1901 or section 24 of Act III of 1926, as "the nearest collateral male relatives in the male line of descent" who shared in the cultivation of Debi Prasad. Against this narrow interpretation there are two objections: (1) There is no mention in this paragraph or any other part of the written statement that these defendants were "the nearest collateral male relatives in the male line of descent" or that they were any relatives of Debi Prasad at all. The reply is made that the plaint paragraph 4 admitted the pedigree and this was admitted in the written statement,

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and that it was therefore not necessary to claim by succession. I think this reply is very weak. If the pleading is to be limited to succession, it should be shown that the pleading does plead succession, but it does not. (2) There is no mention that Debi Prasad was the sole occupancy tenant. On the contrary the paragraph begins by stating that the numbers are the occupancy tenancy of these defendants, before there is any mention at all of Debi Prasad.

For these reasons I consider that it is incorrect to limit paragraph 4 of the written statement to a mere plea of succession. I consider that this paragraph can be fairly taken to include a plea that Soney Lal and Ganga Sahai were co-tenants with Debi Prasad, all three of them being occupancy tenants of the holding. This view explains why the paragraph begins by stating that the plots are the occupancy tenancy of defendants 1 and 2, and then goes on to say that they cultivated the numbers jointly with Debi Prasad and his widow. It is of course obvious that as the greater includes the less, so a plea that these defendants were co-tenants of Debi Prasad will include the plea that they cultivated jointly with him during his life time. But I consider that it is the greater which is stated in this paragraph, and not the less.

The suit was brought in the court of a Munsif and on appeal the Munsif was directed to refer the issue to the revenue court under section 273 of Act III of 1926, "Whether the relation of landlord and tenant exists between the parties?" It has been stated that on this issue the revenue court was not entitled to come to the finding at which it arrived, which was that "Debi Prasad deceased and Soney Lal defendant along with others had ten joint occupancy holdings" and "co-sharing in ten holdings of the deceased is sufficient to prove co-sharing in the deceased's holding in question and corroborates the oral evidence of co-sharing produced by Soney Lal defendant" and "There is no reliable evidence on the record to prove that Debi Prasad deceased and Soney

Lal defendant had partitioned their joint holdings privately". The conclusion is: "For the reasons mentioned above I hold that the relation of landlord and tenant does exist between the plaintiffs and Soney Lal defendant."

Section 273, Act III of 1926 provides: "If . . . defendant pleads that he holds such land as the tenant of the plaintiff . . . the civil court shall frame an issue on the plea of tenancy and submit the record to the appropriate revenue court for the decision of that issue only." The issue is always in the form "Whether the relationship of landlord and tenant exists between the parties?" because section 273 prescribes that form of issue. But the form of issue does not, in my opinion, limit the revenue court in any way from finding how the relationship comes to exist. The court is not prevented from a finding on the origin; on the contrary an omission to find the origin of the relationship would be a defect in the finding, as the reasons for the finding must be given. The claim of the defendants was not apparently put before the revenue court on the ground of succession to Debi Prasad, but on the ground of co-tenancy with Debi Prasad and survivorship after the death of the widow (section 26, Act III of 1926). One fact found by the lower appellate court may be mentioned: "Debi Prasad was a schoolmaster employed in different villages sometimes near and sometimes far away from his village where the fields lay. His elder brother had died. Soney Lal his collateral lived in a separate room of the house which was shared by Debi Prasad." I may note that the pedigree shows no brother of Debi Prasad but an uncle who died without issue. It may also be pointed out that this suit is only for two field numbers, area  $1\frac{1}{2}$  acres, a small holding, and the revenue court found that ten other holdings were joint holdings. I do not think that the finding of the revenue court can be set aside or disregarded by this Court in second appeal on the ground that the revenue court was not entitled to come to that

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finding on the pleadings in the case or the issue referred to it.

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The finding of the revenue court was not a mere finding that Debi Prasad had been the occupancy tenant of the numbers in suit and that at the time of his death defendants 1 and 2 were sharing in his cultivation. What the revenue court found was that defendants 1 and 2 and Debi Prasad were the holders of the occupancy tenancy, as joint occupancy tenants, or co-tenants. On this finding the Munsif dismissed the suit. The plaintiffs appealed and the first ground of appeal was: "*Yeh ki sabit aur musallima hai ki khata nizai tanha kasht dakhilkari Debi Prasad mutwaffa tha, aur usmen respondent number aik ka koi haq wo hissa nahin tha.*" This ground is clearly directed against the finding of the revenue court that defendants 1 and 2 were joint occupancy tenants along with Debi Prasad. The same point has been raised in ground No. 4 which has been translated: "It is fully proved from all the facts on the record that respondent No. 1 is by no means the tenant of the plots in dispute either *by right or inheritance* or in any other way. He is simply a trespasser." This ground No. 4 raises the questions both of right and of inheritance. The lower appellate court has decided the question of inheritance only, which was also raised in ground No. 2: "It is by no means proved that respondent No. 1 and Ganga Sahai deceased were *joint* with Debi Prasad *in the cultivation* of the plots in dispute."

The lower appellate court did not appreciate the distinction between the pleas in regard to right and the pleas in regard to inheritance, and it set out two points, one about profits and the other "Did the defendants 1 and 2 share with Debi Prasad in cultivating the plots?" It begins under this point No. 1 by misquoting the revenue court as finding that "defendants had shared in Debi Prasad's cultivating the plots in dispute and were entitled to succeed Debi Prasad as their collaterals". The judgment then sets out the evidence about sharing

in cultivation and finds for defendants and assumes that succession of defendants followed as a matter of course. The lower court therefore disposed of the appeal of the plaintiffs on a preliminary point, namely that as the defendants 1 and 2 shared in the cultivation of Debi Prasad and were admittedly his nearest male collaterals in the male line of descent, therefore they were entitled to succeed to the occupancy holding on the death of his widow.

On second appeal the plaintiffs have taken the ground that Debi Prasad died while Act II of 1901 was in force and therefore his widow does not come under section 25 (1) of Act III of 1926 but under section 25(2) and on her death her heirs were entitled to succeed and not the heirs of Debi Prasad.

I shall consider this argument later, but I would observe firstly:

(1) There is no finding that Debi Prasad died while Act II of 1901 was in force. Plaintiff paragraph 2 said he died "about two years ago" and the date of the plaint is 8th November, 1927, admitted on 29th November, 1927. Act III of 1926 came into force on September 7, 1926. If the appeal is to be decided on this sole point as to whether Debi Prasad died before or after September 7, 1926, a definite finding on the point seems to me to be necessary, as no one in the two lower courts ever suggested that the date of death was of the slightest importance and no attention was directed to the date. No doubt the written statement paragraph 2 did admit paragraph 2 of the plaint, but the pleading "about two years ago" is vague. Debi Prasad was a school-master and it should be quite easy to ascertain the date of his death. The court below mentions Shiam Lal, brother of the widow, as cultivating in F.1334, after the death of Debi Prasad. F.1334 began on July 1, 1926, and ended on June 30, 1927. If it was the rabi crop which Shiam Lal cultivated, that would be sown after Act III of 1926 came into force on September 7,

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1926. This finding does not show that Debi Prasad died before Act III of 1926.

(2) If the decree of the lower appellate court is to be set aside in second appeal on the ground that the facts found by it do not entitle the defendant No. 1 to succeed because section 25(2) of Act III of 1926 applies, I consider that the case should then be remanded to the lower appellate court for disposal under order XLI, rule 23 of the Code of Civil Procedure of the questions of fact raised by plaintiffs in grounds 1 and 4 of plaintiffs' memorandum of appeal to the lower appellate court. As already shown, the revenue court found that defendants 1 and 2 were joint tenants with Debi Prasad in this holding. The lower appellate court has not considered this finding at all, although it is raised in grounds 1 and 4 of the appeal to it; but the court has disposed of the plaintiffs' appeal on the preliminary ground raised in ground 2 and in part of ground 4 that the defendants 1 and 2 did share in the cultivation and being collaterals were entitled to inherit. Under order XLI, rule 23 it appears to me that as the lower court dismissed the appeal on one ground only, if this Court in second appeal finds that that ground is bad in law, then the case must go back to the lower court for disposal of the other pleas raised by the plaintiffs against the findings of fact by the revenue court against the plaintiffs. The lower court never purported to deal with this plea of co-tenancy at all, and I do not see how this Court can assume that if it had dealt with the finding of co-tenancy it would have set the finding aside.

(3) The plaintiffs in my opinion cannot succeed as long as the finding of the revenue court that defendants 1 and 2 were co-tenants of Debi Prasad still stands. Even if all the grounds of second appeal on the subject of succession were conceded, the case for the plaintiffs could not succeed till this finding is set aside. The extinction of tenancies, which the plaintiffs claim, is provided for in section 35, Act III of 1926, which states: "35 (1)

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The interest of a tenant shall be extinguished—(a) when he dies leaving no heir entitled to inherit it:” In the present case the tenants were Debi Prasad, Soney Lal and Ganga Sahai. Soney Lal is still alive and it cannot be said that the tenant is dead. It is therefore not enough for the plaintiffs to show by legal argument that Soney Lal cannot succeed by the table of succession in section 25(2) on the death of the widow; the plaintiffs must also show that the finding of fact of the revenue court is wrong that Soney Lal was a co-tenant, because as a co-tenant he would take by survivorship on the death of the widow without heirs, under section 26.

It should also be noted that there are two alternatives: (1) that defendant 1 is the heir entitled to succeed under section 24; (2) that defendant 1 is not the heir entitled to succeed under section 24. If we take (1), then defendant 1 succeeds to the interest of Debi Prasad in the joint tenancy. If we take (2), as counsel argues, and hold that there is no heir entitled to succeed under section 24, then defendant 1 takes by survivorship. This is provided for in section 26, Act III of 1926: “and except in the case of widows or of a co-tenant who dies leaving no heir entitled to succeed under section 24, no interest in any exproprietary, occupancy, statutory or non-occupancy tenancy shall pass by *survivorship*”. Debi Prasad and defendant 1 were joint occupancy tenants; if we hold that Debi Prasad died leaving no heir (after his widow) entitled to succeed under section 24, then defendant 1 as the co-tenant takes the interest of Debi Prasad or of his widow by survivorship and thus defendant 1 has on the death of the widow the whole occupancy tenancy. It may be desirable to make this matter of joint tenants and sharing in the cultivation clear by an example. (1) *A* and *B* begin to cultivate a holding and cultivate it for twelve years and obtain occupancy rights. *A* and *B* are joint occupancy tenants, or co-tenants. (2) *A* begins to cultivate a holding and by twelve years’ cultivation *A* acquires occupancy rights.

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*A* is the sole occupancy tenant. After *A* has become an occupancy tenant, *B* shares in his cultivation. *B* has not got any occupancy rights in the holding and *A* remains the sole occupancy tenant. If, however, *B* is a collateral of *A* and becomes entitled to succeed under the order of succession, his sharing in the cultivation enables him to succeed and to thus acquire occupancy rights. Learned counsel has argued this appeal under the impression that the present case is one of (2). This is an error, the finding of the revenue court is that this is a case of (1) and this finding was not set aside in appeal.

The present suit of the landholder for possession would fail (1) because defendant 1 is in possession and has all along been in possession as an occupancy tenant, and section 35(1) (a) has not been satisfied as it is not a case where the tenant has died leaving no heir; (2) because defendant 1 takes by survivorship, section 26. The present suit is for possession of the holding and the dispossession of defendant 1. The suit therefore would fail. As learned counsel devoted much argument to the question of succession I may also deal with the matter. The first ground of second appeal sets out: "Because upon the facts found or admitted Mst. Champa Kunwar not having inherited the holdings (*sic*) in dispute under section 24 of the Agra Tenancy Act of 1926, Debi Prasad having died while Act No. II of 1901 was in force, clause (2) of section 25 of the Agra Tenancy Act, 1926, governs the present case and the defendants could not succeed as heirs of the deceased tenant and are trespassers in law." The argument is that Debi Prasad died while Act II of 1901 was in force and was succeeded by his widow who died when that Act had been repealed by section 2(1) of Act III of 1926, and therefore Act II of 1901 cannot apply because the succession opens on the death of the widow and must be governed by the law in force at her death; that all female occupancy tenants must be taken to be dealt with by section 25, Act III of 1926, and Mst. Champa Kunwar does not come



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under sub-section (1) therefore she must come under sub-section (2), and under sub-section (2) collaterals who shared in her husband's cultivation could not succeed her. This argument was considered by a learned single Judge of this Court in *Jaswant Singh v. Ganga Sahai* (1) and he held that section 25(1) applies to all female proprietary tenants inheriting, whether they take under section 24, Act III of 1926 or under section 22, Act II of 1901. "Perhaps section 25 (1) of the Act is not very happily expressed, but I have no doubt at all that it was the intention of the legislature to divide female tenants into two classes, namely the class which inherited from male tenants, and the class which were tenants in their own right. I cannot believe that it was the intention of the legislature, without a very clear statement to that effect, to change the whole status of every woman who was holding at the date when the Act was passed as an heir to a male tenant and to destroy the rights or interests existing at that time in the reversioners of those male tenants." It is further to be noted that as regards the rights of the widow and the rights of the collaterals Act III of 1926 reproduces the provisions of Act II of 1901, for succession to an occupancy tenant. In each Act the widow may hold "till her death or re-marriage" and the "nearest collateral male relative in the male line of descent" may succeed if he shared in the cultivation of the holding at the time of the tenant's death. In Act III of 1926 section 24 has introduced two other heirs, the father and the "mother, being a widow", between the widow of the tenant and the collaterals. This merely in some cases postpones the succession of the collaterals, if these heirs exist and the collaterals outlive them. But the scheme of the succession as regards the widow and the collaterals is not altered. It would therefore be doing great violence to the language of section 24 of Act III of 1926 to hold that a collateral who complied with its requirements could not succeed. Presumably counsel would argue that the word "dies" must mean

(1) A.I.R., 1934 All., 1042 (1043).



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"dies after the Act III of 1926 comes into force". But the section does not say so, and there is no reason to suppose that section 24 is not intended to apply to a succession which opens out with the death of a widow while Act III of 1926 is in force, even though her husband died before that Act came into force. I consider that the word "dies" in section 24 is used in a perfectly general sense and not limited to death occurring after Act III of 1926 came into force. Section 24 lays down an "Order of Succession" for male tenants. I consider that the section means that that order of succession is to apply whenever the question arises during the time that the Act is in force, independently of the time of death. This section alone is sufficient to govern the succession, and the corresponding section 22 of Act II of 1901 was sufficient during the period that Act was in force. The legislature, however, desired to deal with the case of female tenants who had themselves acquired the rights of occupancy tenants, etc., by twelve years' cultivation, and it provided for the succession to them in section 25(2). To distinguish their case provision was made in section 25(1) for female tenants "who have inherited an interest in a holding" from male tenants, and reference was made to section 24. No doubt, to be complete, reference should have also been made to section 22, Act II of 1901. There are some points of distinction to be noted between a widow on whom the interest of an occupancy tenant has devolved, who may be called *A*, and a woman who has acquired occupancy rights in a holding under section 11 of Act II of 1901 by twelve years' continuous cultivation, or on whom a right of occupancy has been conferred under section 17 of Act III of 1926, or who has otherwise acquired the right under section 16 of Act III of 1926, who may be called *B*.

(1) If *A* abandons or surrenders her interest to the zamindar, section 25(1) of Act III of 1926 provides that the interest devolves upon the nearest surviving heir

of the last male tenant in accordance with the succession in section 24. See also section 108. But if *B* abandons or surrenders her interest in the holding, the landholder will receive possession of the holding and the occupancy tenancy will be extinguished under section 35(1) (c).

(2) If *A* and another widow of an occupancy tenant succeed him under section 24, on the death of one widow the other widow takes the whole holding by survivorship under section 26. But if *B* and her co-widow acquire occupancy rights for themselves, on the death of one widow her interest would devolve as provided in section 25(2).

(3) The interest of one occupancy tenant may be transferred to a person who was a co-tenant from the commencement of the tenancy, or who has become such by succession, or who has been recognized as such in writing by the landholder: section 23(2) (b). If *B* made such a release or transfer it would be valid for the benefit of the co-tenant. It is not provided that such a release or transfer by *A* would be different, but it appears that the principle of an abandonment or surrender by *A* should apply and the result should be that the interest would devolve on the nearest surviving heir of the last male tenant.

(4) *A* loses her rights on re-marriage, *B* does not.

(5) On the death of *A*, or re-marriage, the descent is different in several points. The father of her deceased husband takes next. But he does not become the stock of descent, otherwise on his death his other sons would take as his male lineal descendants. Section 24 provides that the mother, being a widow, takes next, and then the brother, being a son of the same father, instead of this son taking immediately after his father. Then comes the daughter's son, who is succeeded by the nearest collateral male relative in the male line of descent, both of whom must have shared in the cultivation at the time of the original tenant's death.

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But on the death of *B*, she is the stock of descent. Her male lineal descendants in the male line take first. If *A* had been a widow with a family when she married the original tenant, her male lineal descendants by her former husband would not take at all. The next person who takes the interest of *B* is her husband, as in section 24, he does not become a stock of descent. After him comes the daughter's son, provided that he shared in the cultivation at *B*'s death. The father, the mother, the brother, and the nearest collaterals are omitted, doubtless because they belong to the family of *B* and would normally live in another village.

(6) *A* belongs to a class which will continue to arise fairly frequently. But *B* belongs to a class which will die out, as there is no provision in Act III of 1926 corresponding to section 11 of Act II of 1901 by which a woman holding and cultivating for twelve years could acquire occupancy rights. The cases where a right of occupancy will be conferred on a woman under section 17 will doubtless be extremely rare. When the existing female occupancy tenants under section 25(2) have died out, this class will practically become extinct. Female statutory tenants come in sub-section (3). Non-occupancy tenants are now a small class, as the great majority have become statutory tenants under section 19. Exproprietary tenants, female, will no doubt occasionally arise, and they will be the sole survivors in section 25(2). Many of the distinctions between *A* and *B* had been made by judicial decisions under Act II of 1901.

A point to be noted is the language of section 25(1) of Act III of 1926. Does it only apply to a female who has inherited since that Act came into force? If this were intended then it would begin as "(1) When a female exproprietary, occupancy or non-occupancy tenant on whom an interest in a holding *has devolved under section 24 . . .*" This would be the correct construction in English to show that the words "under section 24" are to be taken with the verb, and that the female is to

succeed or inherit under section 24. The word "devolve" is the word used in section 24 and also in section 25(2). But the word "devolve" has been changed to the transitive verb "inherit". The object of the change appears to be to separate the verb from the words "under section 24" and the sub-section runs: "(1) When a female exproprietary, occupancy or non-occupancy tenant who has inherited *an interest in a holding under section 24*..." In English, words modify the word with which they are in proximity and do not modify the more remote word. Grammatically therefore the words "under section 24" modify the expression "an interest in a holding", and the clause cannot be taken to mean "*who has inherited under section 24* an interest in a holding". What is the meaning of the expression "an interest in a holding under section 24"? It means an interest which can be held under section 24. One of those interests is "widow till her death or re-marriage". That is an interest which could also be held under section 22, Act II of 1901. A widow who held such an interest under Act II of 1901, section 22, continued to hold it under section 24, Act III of 1926. as that section continued to recognize that interest as legal. She is therefore correctly described by section 25(1) as "a female occupancy tenant who has inherited an interest in a holding under section 24", because she has inherited an interest which is now recognized by section 24. It was not the purpose of the Act to draw any distinction as to what was the section in force when she inherited; the purpose was to show what kind of an interest she must have inherited to come within section 25(1), and that purpose is shown by stating that it is "an interest in a holding under section 24".

Some light is thrown on section 25(1) if we consider how Act III of 1926 deals with the rights of widows and others who had succeeded an occupancy tenant under section 22, Act II of 1901. For persons who acquired occupancy rights under Act II of 1901 there is provision

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in section 16, Act III of 1926: "Every tenant, who at the commencement of this Act has acquired a right of occupancy under the Agra Tenancy Act, 1901, or under any previous Act . . . shall be called an occupancy tenant." The section does not say "or his successors". The reason is that the successors take the occupancy interest in some cases with certain limitations (re-marriage, stock of descent, etc.). The word "acquire" clearly refers to section 11, Act II of 1901, and covers only those tenants who acquired occupancy rights by twelve years' continuous holding. That section is noted in the margin with the title "Acquisition of right of occupancy" and the section states: "Provided that no tenant shall *acquire* under this section a right of occupancy in any land, etc.". Now under both Acts the successors came in under section 4(1) in Act II of 1901 and section 3(1) of Act III of 1926 which state in identical language: "All words and expressions used to denote the possessor of any right, title, or interest in land, whether the same be proprietary or otherwise, shall be deemed to include the predecessors and successors in right, title, or interest of such person." The language used here is quite indefinite in point of time, and applies equally to a widow who succeeded to an occupancy tenant under section 22, Act II of 1901 or under section 24, Act III of 1926. Under either of those sections a widow succeeds "till her death or re-marriage". A widow who succeeded "till death or re-marriage" under Act II of 1901 continues with such interest, so limited, under Act III of 1926, because under section 3(1) of that Act she is the successor of an occupancy tenant. Her right was and continues to be a limited one, and as that right is to hold "till her death or re-marriage" it may be expressed as "an interest in a holding under section 24" because section 24 deals with such an interest. It is also quite clear that sub-sections (1) and (2) of section 25 mean to distinguish two classes of female tenants, those who have taken by succession to males.

who have only a limited interest and from whom the holding does not devolve, and those who themselves acquired occupancy rights and from whom the holding does devolve. To place a woman who belongs to one class into the other class because of mere verbal construction would violate the intention of the section. Further, such a method of construction ignores the provisions of section 24, which lays down an "Order of succession" and does not limit it to the case of a male occupancy tenant who dies after Act III of 1926 comes into force. The order of succession in section 24 applies when any person holding in succession to a male occupancy tenant dies during the time Act III of 1926 is in force. This must be intended because the previous order of succession of section 22, Act II of 1901 has been repealed, and the present section 24 uses the indefinite tense for the verb "dies", covering the case of a male occupancy tenant who has died before the Act. A widow who succeeded a male occupancy tenant under section 22, Act II of 1901 and who dies while Act III of 1926 is in force will therefore be succeeded by the classes in section 24 below her. If the present case were one of collaterals sharing in the cultivation of the deceased male occupancy tenant, they would succeed the widow. As has been shown, the finding of fact is not merely that they shared in the cultivation, but that they were co-tenants from the commencement of the tenancy who acquired occupancy rights jointly with the husband of the widow. I may note that even if the view of section 25(1) put forward by learned counsel for appellant were adopted, and the widow were put into section 25(2), the appeal would still fail. For on this view the widow would have full occupancy rights and be a co-tenant with defendant 1, and on her death without heirs defendant 1 would take by survivorship from his co-tenant under section 26, and defendant 1 would become the sole occupancy tenant, and plaintiffs would have no right to eject him.

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I would accordingly dismiss this second appeal with costs.

SULAIMAN, C.J.:—I regret I have come to a contrary conclusion.

The *first* question is whether collaterals are entitled to succeed to these tenancies on the death of the widow. Under section 6 of Act X of 1859, section 8 of Act XVIII of 1873 and section 9 of Act XII of 1881, succession to occupancy tenancies was governed by the personal law of the tenant. Section 22 of Act II of 1901 for the first time made a departure and laid down a new rule of succession. The order of succession laid down was purely arbitrary; it was, strictly speaking, not even exactly according to the Hindu law, much less according to the Muhammadan law. But as the majority of the tenants are Hindus, the rule of succession resembled the Hindu law much more. But many persons, who would have been heirs under the Hindu law or the Muhammadan law, were knocked out. Not only many of the heirs under the Muhammadan law but even the husband and the *chela* of the *guru* who would be heirs under the Hindu law were not in the list. Even the daughter's son and the nearest male collateral could succeed only if they shared in the cultivation. For purposes of succession, a marked distinction was drawn between proprietary interest and tenancy rights, the latter being regarded merely as a cultivatory or possessory right. One significant fact was that female tenants were not specifically mentioned; and the mention of the widow and the omission of the husband from the list made the section somewhat repugnant to the interpretation that section 22 applied to female tenants also. There was accordingly a considerable conflict of opinion both in the High Court and in the Board of Revenue as to the order of succession to a widow whose husband had died before 1902 and who herself died while the Act of that year was in force. On the one hand it was

held that section 22 applied: See the cases of *Ayub Ali Khan v. Mashuq Ali Khan* (1), *Dulari v. Mul Chand* (2), *Deoki Rai v. Mst. Parbati* (3), *Nathu v. Gokalia* (4), *Bisheshar Ahir v. Dukharan Ahir* (5), *Bechu Singh v. Baldeo Singh* (6). On the other hand, a contrary view was expressed in the cases of *Musammat Sumari v. Jageshar* (7), *Bhup Singh v. Jai Ram* (8), *Bhawani Bhikh v. Sidh Narain* (9).

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A third view was expressed in perhaps only one case and that was that there was an unintentional omission of a reference to female tenants. This latter view could perhaps simplify matters more than any other.

In this state of affairs it is not at all surprising that Act III of 1926 also has made drastic changes. Some provisions of it are beneficial to landholders while others are advantageous to tenants. Statutory rights have been conferred on tenants who were in occupation of lands at the time the Act came into force and their flimsy tenure has, by operation of law, been converted into at least a life tenancy. In section 24 a father has been added as an heir and a new female heir, the mother, has also been added to the list. A new order of succession is prescribed to tenancies left by females. As the rule of succession is purely arbitrary, I can see no ground for starting with any necessary presumption that, howsoever much in other cases the rule of succession might have been changed, there has been no change whatsoever in the case of a widow. Nor there appears to be any valid ground for imagining that the intention of the legislature must necessarily have been that there should be no change so far as succession to a widow is concerned. As the line of succession is purely arbitrary, the question must, in my opinion, rest exclusively on

- (1) (1908) I.L.R., 31 All., 51. (2) (1910) I.L.R., 32 All., 314.  
(3) (1914) 23 Indian Cases, 100. (4) (1915) I.L.R., 37 All., 658.  
(5) (1916) I.L.R., 38 All., 197. (6) (1922) I.L.R., 44 All., 327.  
(7) (1913) 20 Indian Cases, 7. (8) (1918) 16 A.L.J., 459.  
(9) A.I.R., 1923 All., 18.



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an interpretation of section 25 which deals with female tenants.

For the first time, sections 24 and 25 make a clear distinction between male and female tenants. The legislature, perhaps realising the previous omission, has now thought it necessary to make separate provisions for succession to male and female tenants. The presumption is that the orders of succession now laid down are intended to be exhaustive. Having provided in section 24 for the succession of the widow and the mother when a male tenant dies, section 25 lays down what is to happen when a female ex-proprietary, occupancy or non-occupancy or statutory tenant dies. As I read section 25, it consists of two main sub-sections, the first dealing with certain specific female tenants and the second with all the rest. Sub-section (2) applies to all tenants "other than one subject to the provisions of sub-section (1)". It is obviously the residuary section and must apply to every female tenant who does not come within the scope of sub-section (1). I cannot see any ground for thinking that the legislature has classified female tenants into two groups, (a) those who have limited interest and (b) those who have full interests. Such a classification is not to be found in the section. As the words stand, I am bound to hold that the first sub-section contains a group of specified classes of female tenants, and the second sub-section is the omnibus sub-section including all the rest. Sub-section (2) must apply to a female tenant unless she can be brought within the purview of sub-section (1).

It is a well established rule of interpretation that new words, which the legislature has not used, should not be imported into a section in order to interpret it, when the section as worded can have a rational meaning.

Now the language employed in sub-section (1) applies to a female ex-proprietary, occupancy or non-occupancy tenant (a) who "has inherited an interest in a holding

under section 24" or is (b) the female heir of a statutory tenant, or (c) a widow "of class II in section 24". It seems to me that all these three classes refer to widows who inherit a tenancy after the coming into force of the new Act.

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The expression "under section 24" would ordinarily be taken to be an adverbial prepositional clause modifying the verb "has inherited". There is no inflexible rule that an adverb must not be separated from the verb and must join it. Indeed, more often than not an adverb is put after the object governed by a transitive verb. If, therefore, the expression "under section 24" modifies the verb "has inherited", there can be no doubt whatsoever that it refers to a female tenant who inherits the estate under section 24 of the new Act, and therefore after the coming into force of that Act. On the other hand, an adjective is generally taken to qualify the noun nearest to it and not one more remote. If, therefore, "under section 24" be taken to be an adjectival clause, it would ordinarily qualify the noun "holding"—which would make it meaningless—and not the more remote noun "interest". I am, however, prepared to assume that even as an adjectival clause it qualifies the noun "interest". In my opinion, that does not improve matters in any way, because we are still tied down to the interest acquired "under section 24". There is no escape from this inference unless we put new words into the section and make it read as if it were "an interest in a holding *referred to or recognized in* section 24". There is no justification for such an interpolation. To put such an interpretation on this sub-section, we would be compelled to say that words like "or under the corresponding section 22 of the previous Act" are understood, or we would have to say that an interest under section 24 means "a limited interest of the kind mentioned in section 24". I feel that I must interpret the section as it stands,

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without giving to it an unnecessarily constrained meaning and making it include inheritance under the previous Tenancy Act, which it does not profess to do, simply because it might be thought that the inheritance to a female widow must have been left untouched by the legislature. Nor do I think that the expression that "when a female . . . tenant . . . dies", which is in the present tense, should be construed as meaning "where a female tenant *had died* before the Act came into force". I must give to the words their natural meaning unless there is something which compels me to depart from such a course.

The second class of tenant, namely, the female heir of a statutory tenant must, of necessity, die after the coming into force of the Act, for there were no statutory tenants earlier. It, therefore, seems to me that the same verb "dies", which applies to female heirs of statutory tenants also, cannot mean "had died before the Act came into force".

Similarly, the third class of tenant is a widow of class II in section 24. Here the section is far more specific. It refers in express terms to "class II *in* section 24". I am unable to change these words and read them as if they meant a widow who has a limited interest for life until re-marriage of the *kind* mentioned in class II in section 24. Had the legislature intended that a widow who had inherited under section 22(b) of the earlier Act should also be included, there is no reason why it should not have said so clearly.

Again, the fact that under sub-section (3) the heir to a female statutory tenant (who has not inherited an interest under section 24) is not governed by sub-section (1) but is governed by sub-section (2) shows that even female tenants have been given higher rights.

It has been argued that under section 24, it is only an interest in the holding and not the holding itself

which devolves on females. I see no force in this contention, because it is the interest in the holding alone which under section 24 devolves on the male lineal descendants, the father, the brother, the daughter's son and the nearest collateral. The same expression is again used in section 25. Thus both female and male heirs are spoken of as getting an interest in the holding. To my mind the use of the word "inherited" in section 25 as compared to the word "devolve" is not of any peculiar significance.

I feel considerable difficulty in saying that a female heir is not a tenant. She is expressly spoken of as an ex-proprietary, occupancy or non-occupancy tenant in the first two sub-sections of section 25. According to the definition of "tenant" in section 3, sub-section (6), a tenant is merely a person by whom rent is payable. There would be enormous difficulties in assuming that she is not an ex-proprietary, occupancy or non-occupancy tenant, but something else. In the first place section 10 specifies only 7 classes of tenants for the purposes of this Act and the list is obviously exhaustive. No other category is, therefore, admissible. In the second place, most of the provisions of the Tenancy Act relating to recovery of arrears of rent, ejectment, enhancement of rent, etc., would, in terms, become inapplicable to female tenants, which could not possibly have been the intention of the legislature. I am, therefore, constrained to hold that sub-section (1) is confined to only three classes of females mentioned above and no more. It follows that sub-section (2) applies to all other female ex-proprietary, occupancy and non-occupancy tenants. The words "any female . . . tenant other than one subject to the provisions of sub-section (1)" are obviously intended to be wide and general. I am unable to hold that in spite of the serious conflict of opinion arising in the High Court and in the Board of Revenue under the previous Tenancy Act due to an omission to refer to

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widows who were already in possession of tenancies, the legislature has again failed to specifically refer to them. I am loath to attribute a further omission on the part of the legislature, and must conclude that as widows who had inherited tenancies under the previous Act are not mentioned in sub-section (1), they necessarily come in the residuary clause in sub-section (2).

I can see no catastrophe resulting from such an interpretation. As already pointed out, the personal law was radically changed even by the previous Act. The law has undoubtedly been changed to some extent by the new Act, and there is nothing surprising if the law has been changed to some extent as regards female tenants. Certainly the mother has been added for the first time and separate provisions for females have been made in section 25. It must also not be forgotten that Muhammadan widows and mothers, who, under their personal law, would inherit absolutely, have been deprived of such right. Again, every tenant who was in possession even for a very short time has been given statutory rights. It is, therefore, nothing startling if widows have been given some more rights under the new Act.

But really I do not consider that any greater rights have been conferred on female tenants. Apparently the legislature does not consider that a change in the line of succession in any way diminishes the interest of the tenant. If that were so, then it might well be argued that the previous Act of 1901 took away some of the rights of the male tenant inasmuch as his heirs under his personal law were excluded. And undoubtedly a serious change was made so far as the Muslim females were concerned. The fact is that heirs have only contingent and not vested rights, and so there is no deprivation.

Lastly, when we come to examine the practical difference in the categories given in sections 24 and 25,

we find that the main difference is that collaterals are altogether excluded under the last section even if they shared in the cultivation. This provision is for the benefit of the landholders, as there is a possibility of the tenancy lapsing to them. It is no wonder if the landlords, who were adequately represented in the legislature, gained this point in their favour. As regards the other possible difference, barring the rare case where a widow may re-marry and have children from her new husband, the line of heirs is identical. Her lineal descendants and her daughter's son would be the same as those of her husband; and the husband in section 25 corresponds to the widow in section 24. I see absolutely no reason why these slight differences could not have been intended by the legislature. As already pointed out there were changes introduced by the previous Act and so changes have been made in the new Act, as the law of succession is a purely arbitrary one.

Another consideration which weighs with me is that this interpretation would now bring about a perfect uniformity, no matter whether the female tenant is a Hindu, a Muhammadan or a Christian or belongs to any other section. A contrary interpretation would make Hindu widows, who had limited interest, governed by the order of succession in section 24, while Muhammadan widows, to whom section 22 of the previous Act might not apply, would not be so governed.

I am, therefore, of the opinion that on the death of the widow, the succession to the tenancy is governed by section 25, sub-section (2), and the collateral heirs of her deceased husband are altogether excluded.

I am also unable to agree that the suit must fail in any case, because the defendants must be taken to have been joint tenants. Now the only question which was referred to the revenue court and which it took up for consideration was whether the relation of landlord and tenant existed between the parties and its finding was

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directed to that point. No doubt, in giving its reasons it mentioned that the tenancies had been joint, but such a plea had not been taken in express terms in the written statement, in which paragraph 4 had merely alleged that they "*were joint in cultivation* of the plots in dispute" which "*are their occupancy holdings*". In fact the allegation in paragraph 2 of the plaint that Debi Prasad was the occupancy tenant of these plots and on his death his widow became their occupancy tenant with life interest was admitted in paragraph 2 of the written statement without any reservation. In my opinion it was not open to the revenue court to consider such a case. The lower appellate court considered that there were only two points for determination in the appeal, and, besides the question of profits, directed its attention only to the question whether the defendants had shared with the deceased tenant in cultivating the plots, presumably because there was no plea that the lands *were their joint holdings*, and it had been merely said that "they cultivated the said plots jointly". The finding that they so shared is by implication contrary to the assumption that they did not share in the cultivation but were themselves joint tenants. There is certainly no finding by the lower appellate court that they were joint tenants of the holding. In these circumstances if it were open to the defendants to take the plea that they are not heirs of the deceased tenant, but were themselves joint tenants with him, then we would have to ask the lower appellate court for a clear finding on it, and as there was no specific issue framed on the point, the parties might have to be allowed to produce fresh evidence. But, in my opinion, on the pleadings in this case such a plea is not open to the defendants. I would, therefore, allow the appeal and decree the plaintiffs' suit with costs.

BY THE COURT:—As we differ on the following questions of law, we direct that the case be laid before

the Chief Justice for the questions being referred to one or more Judges of this Court under section 98 of the Code of Civil Procedure for an expression of opinion:

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1. Whether, where a Hindu occupancy tenant died while the Tenancy Act II of 1901 was in force and was succeeded by his widow and the widow died after the coming into force of the Tenancy Act III of 1926, the succession is governed by section 25, sub-section (1) or section 25, sub-section (2) of the new Tenancy Act?

2. Under the circumstances of question 1, is defendant No. 1 entitled to succeed under section 24 of Act III of 1926 or otherwise to the occupancy holding on the finding that he is the nearest collateral male relative in the male line of descent, and that he shared in the cultivation of the last male occupancy tenant at his death?

3. Is it open to the defendant in this second appeal to have the case sent back to the court below for a finding as to whether, if defendants are not entitled to succeed as heirs of the last male occupancy tenant, they are entitled to claim the whole occupancy tenancy by survivorship under section 26 of the Tenancy Act III of 1926 as co-tenants of a tenant who has died leaving no heir entitled to succeed?

4. On the admission in paragraph 2 and the plea in paragraph 4 of the additional pleas of the written statement, was it open to the revenue court to come to a finding of joint ownership of the occupancy tenancy by defendant 1 and Debi Prasad?

The case was then laid before and heard by BAJPAI, J., who delivered the following judgment:

BAJPAI, J.:—Certain questions of law arising in this appeal have been referred to me under section 98 of the Code of Civil Procedure on a difference of opinion between the CHIEF JUSTICE and Mr. JUSTICE BENNET.



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Before I express my opinion on those questions it is necessary that the facts of the case should be stated at some length.

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In the suit which has given rise to this appeal Piare Lal, Mizaji Lal and Raghunath Prasad, Kalika Prasad and Soney Lal, sons of Janki Prasad, were the plaintiffs, and Soney Lal, son of Baldeo Prasad, Ganga Sahai and Darshan Lal were the defendants. Ganga Sahai died during the pendency of the suit and Soney Lal defended the suit in his own right and as heir of Ganga Sahai deceased. The plaint stated that the plaintiffs and the defendant Darshan Lal were co-sharers and zamindars of half and half in mahal Sundar Lal, mauza Kamalpur, district Mainpuri and Darshan Lal was a lambardar of the said mahal. In paragraph 2 it was stated: "The plots given below lie in the said mahal. Debi Prasad, the occupancy tenant of those plots, died about two years ago without leaving any issue. On his death, his widow Mst. Champa Kunwar became the occupancy tenant of the said plots with life interest." It then went on to say that Mst. Champa Kunwar died in July, 1927, and on her death the holding comprising the plots in dispute became *la-waris* (unclaimed, in the absence of heirs) and the plaintiffs and Darshan Lal became entitled to get possession and occupation as zamindars. The defendants Soney Lal and Ganga Sahai, although they were related to Debi Prasad, were not joint in cultivation with him, and they without any right entered into possession of the holding. The defendant Darshan Lal had no right to give occupancy rights in respect of those plots without the consent of the plaintiffs, but he for his own private gain, on receipt of Rs.200 as *nazrana*, instituted suit No. 195/56 of 1927 for the ejectment of Soney Lal and Ganga Sahai, but he did not properly look after the case and on the 7th of October, 1927, caused his suit to be dismissed with an order in favour of Soney Lal and

Ganga Sahai to the effect that they were the occupancy tenants of the plots in dispute by virtue of their being the heirs of Debi Prasad and of their having been joint in cultivation with him. It was said that the above decision was collusive and fraudulent and the defendants Soney Lal and Ganga Sahai were liable to be ejected. On the above allegations the plaintiffs prayed that the decision of the Assistant Collector dated the 7th of October, 1927, might be declared to be ineffectual and the plaintiffs might, on reservation of the rights of Darshan Lal, and on dispossession of Soney Lal and Ganga Sahai be put in proprietary possession of the plots in suit. Damages and mesne profits were also claimed.

Darshan Lal, who was a *pro forma* defendant, did not file any written statement, but Soney Lal who after the death of Ganga Sahai was the principal defendant filed a written statement and in that document paragraph 2 of the plaint was admitted. The defendant then went on to assert that the suit was not cognizable in the civil court, that the relationship of landlord and tenant did not exist between the parties, that the plaintiffs had full knowledge of the previous suit for ejectment in which there was no fraud or collusion and therefore that decree operated as *res judicata*. In paragraph 4 of the written statement it was stated that the contesting defendant and Ganga Sahai were joint in cultivation with Debi Prasad in his life time and with his widow Mst. Champa Kunwar after the death of Debi Prasad in the plots in dispute which were their *maurusi* and the allegations of the plaintiffs to the contrary were quite wrong.

The suit was instituted in the court of the Munsif and he on the 30th of April, 1929, decreed the plaintiffs' suit for possession and for Rs.30 as mesne profits. On appeal the learned Subordinate Judge on the 1st of April, 1930, directed "the Munsif to refer the question of tenancy to the revenue court which should be requested to decide the question independently of the

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finding in the revenue court in suit No. 195/56 of 1927, dated the 7th of October, 1927, which has been held to be fraudulent". It would appear that the Munsif had on a former occasion sent the record to the revenue court for determination of the question of tenancy and the revenue court held that it was bound by the previous decision of the revenue court wherein the defendants were declared to be the occupancy tenants on a suit brought against them by Darshan Lal. It was for this reason that on the 1st of April, 1930, the learned Subordinate Judge made the above direction. The learned Munsif then, on the 3rd of May, 1930, referred an issue to the revenue court with a request that the question be decided independently of the finding of the revenue court in suit No. 195/56 of 1927, dated the 7th of October, 1927. The issue was, "Whether the relation of landlord and tenant exists between the parties". The revenue court began by saying that it was admitted in the plaint and had been satisfactorily proved by Soney Lal defendant that he (Soney Lal) was the nearest male collateral of Debi Prasad, the deceased occupancy tenant of plots Nos. 34 and 38, and therefore *the only question to be decided in the case was whether Soney Lal defendant co-shared with Debi Prasad in the cultivation*. It then went on to say: "It appears from the evidence on the record that both Debi Prasad deceased and Soney Lal defendant along with others had ten joint occupancy holdings in villages Kamalpur and Alipur patti. Both Debi Prasad and his widow Mst. Champa have died. From the holdings situate in Alipur patti the names of both Debi Prasad and his widow have been removed while in those situate in Kamalpur the name of Debi Prasad's widow still stands along with the names of Soney Lal defendant and others." I am quite clear in my mind that the above mentioned joint occupancy holdings are different from holdings consisting of Nos. 34 and 38 which are

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in suit, for the learned Assistant Collector goes on to say that "co-sharing in ten holdings of the deceased is sufficient to prove co-sharing in the deceased's holding in question and corroborates the oral evidence of co-sharing produced by Soney Lal defendant", and then regarding those ten holdings the learned Assistant Collector observes that there was no reliable evidence on the record to prove that Debi Prasad deceased and Soney Lal defendant had partitioned their joint holdings privately. Paper No. 35 C of the record which is a copy of the khatauni of 1325 F., corresponding to 1918, shows that the names of Debi Prasad and his uncle Banwari Lal alone appear against the plots in dispute, and in the khatauni of 1333 F. the name of Mst. Champa Kuar alone appears. On the finding that the defendant Soney Lal was a co-sharer with the deceased Debi Prasad in the holding in dispute the revenue court held that the relationship of landlord and tenant did exist between the plaintiffs and Soney Lal.

When this finding came to the civil court the learned Munsif on the 19th of May, 1931, dismissed the plaintiffs' suit. The plaintiffs filed an appeal in the court of the District Judge and there they pleaded that it was admitted and proved that Debi Prasad deceased was the sole occupancy tenant of the holding in dispute and that it was by no means proved that Soney Lal and Ganga Sahai deceased were joint with Debi Prasad in cultivation of the plots in dispute. The learned District Judge agreed with the finding of the revenue court and came to the conclusion that the right of the defendant Soney Lal to succeed Debi Prasad was complete owing to his having shared in Debi Prasad's cultivation with him in his life time.

In second appeal it was contended that as Mst. Champa Kuar did not inherit the holdings in dispute under section 24 of the Agra Tenancy Act of 1926, Debi Prasad having died while Act No. II of 1901 was

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in force, clause (2) of section 25 of the Agra Tenancy Act, 1926, governed the present case and the defendants could not succeed as heirs of the deceased tenant and were trespassers in law. The appeal coming before a single Judge of this Court was referred to a Bench of two Judges and the learned Judges constituting the Bench differed on certain questions of law which, as I stated before, have been referred to me for my opinion. The first two questions so referred are as to the order of succession and the next two relate to pleadings.

I propose to take up question No. 4 first. That question assumes that the revenue court in its order dated the 25th of April, 1931, did come to a finding that the holding in dispute in the present case was jointly owned by Soney Lal and Debi Prasad. In an earlier portion of my judgment while stating the facts I have said that I am quite clear in my mind that the ten joint occupancy holdings mentioned by the revenue court did not include the occupancy holding in dispute, but that they were different from plots Nos. 34 and 38 and that this was obvious. Learned counsel before me were unable to show that the ten joint occupancy holdings in villages Kamalpur and Alipur patti include the holding in dispute in the present case, and, while determining the question of co-sharing, the revenue court as a *matter of law* relying upon the cases of *Ram Das v. Thakur Ram Narain* (1) and *Bankat Singh v. Badri Prasad* (2) held that co-sharing in ten holdings of the deceased was sufficient to prove co-sharing in the deceased's holding. I do not think that the revenue court ever found that the holding in dispute in the present case was in the joint ownership of Soney Lal and Debi Prasad. As the question assumes that the revenue court did arrive at such a finding I am asked to give my opinion on the question whether it was open to the revenue court to come to such a finding. Now

(1) (1926) 7 Law Reporter (Allahabad), 188.

(2) (1927) 8 Law Reporter (Allahabad), 336.

in paragraph 2 of the plaint the plaintiffs distinctly said that Debi Prasad, the occupancy tenant of the plots in dispute, died about two years ago without leaving any issue and on his death his widow Mst. Champa Kuar became the occupancy tenant of the said plots with life interest. This paragraph was admitted without any reservation by paragraph 2 of the written statement. It was open to the defendants while admitting certain portions of paragraph 2 of the plaint to say that certain others were not admitted. I find in this very written statement certain paragraphs dealing with general denials and admissions and there are several statements to the effect that certain portions of a particular paragraph of the plaint were admitted and certain portions of the same paragraph were not admitted. If therefore the defendants wanted only to admit the death of Debi Prasad and nothing further, they could very well have said so. It is, however, said that the case of the defendants was developed in the additional pleas in paragraph 4. I have stated that paragraph also at length and I am of the opinion that the main contention of the defendants there was that they cultivated the plots jointly with Debi Prasad during his life time and with his widow after the death of Debi Prasad. It is true that they did say that the plots in dispute were their *maurusi*. The word *maurusi*, however, does not necessarily mean that the plots were the joint occupancy holdings of Debi Prasad and the defendant Soney Lal. Literally *maurusi* means "ancestral", and it might well be that all that the defendants wished to convey was that the occupancy right in the plots was not acquired by Debi Prasad himself, but that it was a plot which was in the family from the time of the ancestors, and it is quite clear, according to the pedigree in the plaint, that the defendants are members of the family of Debi Prasad, and it was only in this sense that the defendants called the plots as *maurusi*, as distinguished from self-

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acquired. I am not prepared to attach very great importance to the memorandum of appeal filed by the plaintiffs in the court of the District Judge wherein it was stated in the first plea that it was proved and admitted that Debi Prasad was the sole occupancy tenant of the holding in dispute and that respondent No. 1 had no right to and share in it. The judgment of the revenue court was not very happily expressed and there was a possibility of interpreting it as implying that there was a finding therein to the effect that the holding in dispute was the joint holding of Debi Prasad and the defendant Soney Lal. The plea was intended to attack that finding if there was such a finding. If there was no such finding the plea was superfluous. When paragraph 4 of the memorandum of appeal is correctly translated it runs as follows: "It is fully proved from all the facts on the record that respondent No. 1 is by no means the tenant of the plots in dispute either by inheritance or in any other way and that he is a pure trespasser." The office has not translated that paragraph correctly and has added the words "by right or" before "inheritance". No adverse inference can be drawn from this paragraph as it stands in the original. I am, therefore, of the opinion that it was not open to the revenue court to come to a finding of joint ownership of the occupancy tenancy by defendant No. 1 and Debi Prasad.

I now propose to answer question No. 3. From what I have stated before it is clear that I am of the opinion that the defendant never set up the plea of being a joint tenant with Debi Prasad in the plots in dispute and that no court has so far found that he was such a joint tenant. Before the revenue court, when the matter came for the first time on a suit brought by Darshan Lal in 1927, the court found that the defendant Soney Lal was Debi Prasad's collateral and was joint with him in cultivation. The revenue court in



1931 also said that the question to be decided was that of the co-sharing in cultivation and decided that question in favour of the defendant Soney Lal. The learned Subordinate Judge also found that Soney Lal's right to succeed Debi Prasad became completed owing to his having shared with Debi Prasad's cultivation with him in his life time. I am, therefore, of the opinion that it is not open to the defendants in this second appeal to have the case sent back to the lower appellate court for a finding as to whether, if defendants are not entitled to succeed as heirs of the last male occupancy tenant, they are entitled to claim the whole occupancy tenancy by survivorship under section 26 of the Tenancy Act III of 1926 as co-tenants of a tenant who has died having no heir entitled to succeed.

I now propose to consider the first two questions which are the principal questions in this appeal. The facts are that Debi Prasad, as stated in the plaint and as admitted in the written statement, died about two years before the institution of the suit. The suit was instituted on the 10th of November, 1927, and the admitted death of Debi Prasad must therefore be said to have taken place about November, 1925. The present Tenancy Act came into force on the 7th of September, 1926, and in spite of the element of approximation contained in the words "about two years ago" I cannot hold that it is possible to say that Debi Prasad died after the present Tenancy Act came into force. It must be taken that it was admitted that Debi Prasad died when Act II of 1901 was in force. The court below mentions Shiam Lal, brother of the widow, as cultivating in 1334 Fasli after the death of Debi Prasad and the Fasli year 1334 began on the 1st of July, 1926. All the facts therefore point to the death of Debi Prasad having taken place when Act II of 1901 was in force. That being so, the widow of Debi Prasad entered into possession of the

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holding under section 22 of Act II of 1901, and under clause (b) his interest in the holding would devolve on the widow till her death or re-marriage. The widow Mst. Champa Kuar also admittedly died in July, 1927, when Act III of 1926 was in force and the question is whether the succession to the widow would be governed by clause (1) or clause (2) of section 25. Clause (1) runs as follows: "When a female ex-proprietary, occupancy or non-occupancy tenant who has inherited an interest in a holding under section 24 . . . dies . . . such interest shall, notwithstanding anything contained in section 35, devolve upon the nearest surviving heir of the last male tenant, such heir being ascertained in accordance with section 24." If the above clause applies it is clear that the defendant Soney Lal would succeed inasmuch as if an ascertainment is made in accordance with section 24 Soney Lal would come in class VII, being the nearest collateral male relative of Debi Prasad in the male line of descent and who, according to the finding of the court below, shared in the cultivation of the holding at the time of Debi Prasad's death. If, however, clause (1) of section 25 does not apply, then obviously clause (2) would apply and Soney Lal would not be one of the persons on whom the interest in the holding could devolve. Now there cannot be the slightest doubt that Mst. Champa Kuar was a tenant. "Tenant" is defined in clause (6), section 3 of the Tenancy Act as the person by whom rent is, or but for a contract, express or implied, would be payable, and Musammat Champa Kuar was a person by whom rent was payable. She must also be deemed to be an occupancy tenant, for section 16 defines an occupancy tenant as a tenant "who at the commencement of this Act has acquired a right of occupancy under the Agra Tenancy Act, 1901". Debi Prasad being admittedly an occupancy tenant had undoubtedly acquired a right of occupancy under the Agra Tenancy

Act of 1901, and under section 4 of the former Act all words and expressions used to denote the possessor of any right, title or interest in land shall be deemed to include the predecessors and successors in right, title or interest of such person. The question then arises whether she has inherited an interest in a holding under section 24. Ordinarily the obvious answer to this question would be that she has inherited an interest in a holding not under section 24, but under section 22 of the previous Act. In *Bank of England v. Vagliano* (1) Lord HERSCHELL said: "I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law and not to start with inquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute, critical examination of the prior decisions." This passage was quoted as a guide by their Lordships of the Privy Council in *Norendra Nath Sircar v. Kamal Basini Dasi* (2). If I were therefore to examine the language of the statute and to ask what is the natural meaning of the expression, "When a female ex-proprietary, occupancy or non-occupancy tenant who has inherited an interest in a

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(1) [1891] A.C., 107.

(2) (1896) I.L.R., 23 Cal., 563(571).

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holding under section 24", I would say that the natural meaning is that clause (1) of section 25 can apply only in a case when the death has occurred of a female tenant who has got the holding by inheritance under section 24. "Under section 24" is either an adverbial phrase or adjectival phrase. If it is an adverbial phrase it obviously modifies the verb "inherited". If the meaning of clause (1) is interpreted on the assumption that the phrase under consideration is an adverbial phrase modifying the verb "inherited", it is clear that one will have to say that Mst. Champa Kuar did not inherit under section 24. If, however, the phrase is an adjectival phrase, the clause might be paraphrased in the following manner: "When a female ex-proprietary, occupancy or non-occupancy tenant who has inherited a section-24 interest in a holding." I doubt very much if, even by this paraphrase, it would be possible to explain the expression "a section-24 interest in a holding" as meaning "an interest till death or re-marriage". It would once again mean "an interest acquired under section 24". It would not mean "an interest referred to or recognized in section 24" without some violence to the natural meaning of the language. It was easy for the legislature to have said, "who has inherited an interest in a holding under section 24 *or under any previous Act*". Such expressions do occur in section 16 and in section 14, clause (4) of the present Tenancy Act and in section 14, clause (c) of Act II of 1901. The present Tenancy Act does not even contain any provision analogous to the one contained in section 158 of the Code of Civil Procedure and it is nowhere stated that so far as may be practicable a reference to any section of the present Act shall be deemed to include a reference to the corresponding section of the previous Act; and an Act is not retrospective unless it is specially made so. Further I am of the opinion that the expression "under section 24" is an adverbial phrase

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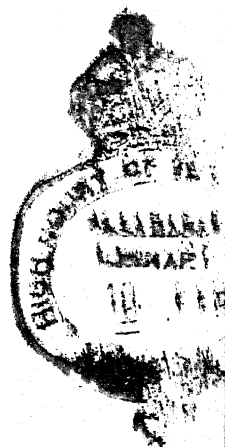
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modifying the verb "inherited", because section 24 deals with inheritance and not with the interest which an heir acquires. The marginal note to section 24 says "Succession of male tenants" and the marginal note to section 25 says "Succession of female tenants". This is in clear antithesis to the marginal note of section 26, "Passing of interest by survivorship". If therefore section 24 deals with succession, the phrase "under section 24" ought to be made to modify the verb "inherited" instead of converting it into an adjectival phrase and being made to qualify the noun "interest". To my mind the words are explicit and they, as observed by their Lordships of the Privy Council in *Commissioner of Income-tax v. Bombay Trust Corporation* (1), "must rule, whatever may be the general considerations as to what the legislature was minded or was likely to do".

The order of succession mentioned in section 22 of the former Act or sections 24 and 25 of the present Act is purely arbitrary, and, as observed by Lord HERSCHELL, if one were to be influenced by any considerations derived from the previous state of the law and to start with inquiring how the law previously stood, then the very utility of a statute codifying a particular branch of law would be destroyed. It is, therefore, perhaps not necessary to inquire into the wisdom of the legislature in enacting a particular rule of succession, but even if one were to do so no disastrous or anomalous consequences would follow according to my interpretation. The previous Tenancy Act did not prescribe the method of devolution in the case of a female tenant and as there was some conflict of authority in the cases decided under the former Act it was thought necessary to provide for succession of female tenants specifically, and it did provide for it in clauses (1), (2) and (3) of section 25. It is said, as observed

(1) (1929) I.L.R., 54 Bom., 216(223).



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by Mr. Oppenheim in *Maharaja of Benares v. Munni Lal* (1), that it was the intention of the section to divide female tenants into two classes, those with absolute or *quasi* absolute estates such as Muhammadan widows who had succeeded under the Rent Act of 1881 or women who had cultivated themselves as non-occupancy tenants for more than 12 years, and women with life interests only. This was also the view of ALLSOP, J., in the case of *Jaswant Singh v. Ganga Sahai* (2), where the learned Judge observes: "Perhaps section 25(1) of the Act is not very happily expressed, but I have no doubt at all that it was the intention of the legislature to divide female tenants into two classes, namely, the class which inherited from male tenants and the class which were tenants in their own right. I cannot believe that it was the intention of the legislature, without a very clear statement to that effect, to change the whole status of every woman who was holding at the date when the Act was passed as an heir to a male tenant." Both the Board of Revenue and the learned Judge then had recourse to section 6 of the United Provinces General Clauses Act, and said that the Act could not by reason of the said provision operate to the prejudice of the reversioners of the last male tenant or to the prejudice of the landlord existing at the time when the new Act was passed. With great respect I am of the opinion that section 6 of the General Clauses Act does not apply. Section 6 of the United Provinces General Clauses Act provides that where any United Provinces Act repeals any previous enactment the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed. Reversioners and landlords have only inchoate or contingent rights until the succession opens out and such rights are not rights accrued

(1) S.D.B., No. 3 of 1932.

(2) A.I.R., 1934 All., 1042.

but rather rights which may accrue. It is only vested rights which are protected by section 6.

Arguments based upon the intention of the legislature are really irrelevant, but it is said that "Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity or the absolute intractability of the language used." Maxwell in his *Interpretation of Statutes*, 7th edition, page 198, says: "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to . . . some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, by altering their collocation, by rejecting them altogether, or by interpolating other words, under the influence, no doubt, of an irresistible conviction that the legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language and really give the true meaning." I am, however, of the opinion that this principle can apply to the facts of the present case only if we were to assume that the real intention of the legislature was to divide female tenants into two classes, namely the class which inherited a limited estate from males and the class which were tenants in their own right or which had absolute interest. The intention of the legislature might well have been to divide the female tenants into two classes by way of clear dichotomy, namely those who have inherited under section 24 and those who did not so inherit. The female statutory tenant and the female heir of a statutory tenant as a new class of tenants are also introduced for the first time in the new Tenancy

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Act. The case of a female heir of a statutory tenant was included in clause (1) and the female statutory tenant herself was provided for in clause (3). This interpretation, as observed by the learned CHIEF JUSTICE, "would now bring about a perfect uniformity, no matter whether the female tenant is a Hindu, a Muhammadan or a Christian, or belongs to any other section."

There would also be some violence to language in interpreting the expression, "In the case of a widow of class II in section 24, who re-marries", occurring in section 25, clause (1). It would not be possible to interpret this as including the case of a widow who has inherited an interest similar to that in section 24. The expression is a rigid one and it applies only to the specific case of a widow of class II in section 24 re-marrying.

One other argument was advanced before me and it was to the effect that if clause (2) of section 25 were to apply also to the case of a widow having a life estate only, such as a widow who inherited under section 22 of the previous Act, the clause would not be effective, inasmuch as the clause provides that in the case of the death of such a person *her interest* in the holding shall devolve and as her interest in the holding was only till death there is nothing which can devolve after her death; but practically the same words are used in clause (1) which *ex hypothesi* applies to the devolution of an interest of a life estate holder. The words there are "such interest shall devolve", and if we investigate as to what such interest is we find that the interest which she has inherited is only a life interest. No difference would be made by the saving clause "notwithstanding anything contained in section 35", for that safeguard applies possibly to surrender or abandonment only.

I am, therefore, of the opinion that where a Hindu occupancy tenant died while the Tenancy Act of 1901



was in force and was succeeded by his widow and the widow died after the coming into force of the Tenancy Act of 1926, the succession would be governed by sub-section (2) of the new Tenancy Act, and that the nearest collateral male relative in the male line of descent who shared in the cultivation of the last male occupancy tenant at his death would not be entitled to succeed under section 24 of Act III of 1926 or otherwise.

For the reasons given above my answers to the various questions that have been referred to me for opinion are:

Question 1: The succession would be governed by sub-section (2) of the new Tenancy Act.

Question 2: No.

Question 3: No.

Question 4: No.

Before Sir Shah Muhammad Sulaiman, Chief Justice,  
and Mr. Justice Bennet

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*Civil Procedure Code, section 60—Property saleable in execution—Pari or turn to receive offerings at a temple—Unconnected with any personal services or duties to be performed—Civil Procedure Code, section 52—Assets of deceased person in the hands of his heir—Right to receive a periodical future income.*

Where offerings are made to a deity at a temple and the persons who have a right to receive the same have not to render services involving qualifications of a personal nature, such as officiating at the worship, as a consideration for the receipt of the offerings, such a right is transferable property and can be attached, in execution of a decree, and sold by auction to the general public. Where there is no connection between the receipt of a share of the offerings and the performance of the service at the temple, the sale is not restricted to a limited class of persons and can be made to the general public.

\*First Appeal No. 102 of 1931, from a decree of J. N. Kaul, First Additional Subordinate Judge of Benares, dated the 2nd of February, 1931.

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In execution of a decree against the assets of a deceased person in the hands of his heir, the right to receive the offerings periodically in future can be attached and sold, as being such an asset, and not only the collections which have actually been made by the heir.

Messrs. *P. L. Banerji* and *Gadadhar Prasad*, for the appellant.

Mr. *Shiva Prasad Sinha*, for the respondent.

SULAIMAN, C.J., and BENNET, J.:—This is a first appeal by defendant No. 1 Nand Kumar Datt against a declaratory decree of the trial court. The plaintiff Ganesh Das brought a suit for a declaration that property consisting of "*paris*" or shares in the offerings of a number of temples in Benares city was liable to attachment and sale in execution of a decree passed in favour of the plaintiff in suit No. 141 of 1922 against the assets of one Kameshwar Panda in the hands of his daughter defendant 2, Mst. Betwi. In appeal two grounds have been raised. Firstly that the lower court was wrong in holding that the sale deed of 10th September, 1919, which was prior to the decree and was in favour of defendant 1 executed by Kameshwar Panda, his brother, was a bogus transaction; and secondly that the court below wrongly decided issue No. 5 in favour of the plaintiff and that the court should have held that these "*paris*" are emoluments attached to an office and that the holder of the office can transfer his right in the office and the emoluments attached thereto to another co-sharer in the office but that the plaintiff who was a stranger and a bania could not claim the offerings as detached from the office because it was only by virtue of the services rendered as panda that the emoluments fell due.

The judgment then discussed the evidence on the question of the genuineness of the sale deed and agreed with the lower court in finding that this sale deed in favour of Nand Kumar Datt was a bogus transaction and was not intended to pass the property in question.

The point of law remains as to whether the plaintiff should receive a declaration that the *paris* in question are liable to attachment and sale in execution of the plaintiff's decree. The case was not argued exactly on the lines set out in the first ground of the memorandum of appeal, but it was claimed that the *paris* could only be transferred in favour of another co-sharer in the office so that they could not be put up for auction sale to the public. Now against this contention, in the first place there is the sale deed on which the title of the appellant is based. That sale deed sets out that the property is one "possessed by me exclusively in which I have no other co-sharer or partner and in respect of which I have got all sorts of rights of alienation". In paragraph 2 of the sale deed it is set out that the vendee "is at liberty to exercise any proprietary right he likes; he may mortgage, sell or make a gift, etc. of the same; he may do whatever he likes". These expressions clearly set out that the property is one which may be transferred to any member of the public without any limitation whatever. The case for the appellant is now entirely different and he claims that the property is only transferable to a co-sharer. This claim was not put forward in the written statement which was filed on the 22nd March, 1930. It was only a year later, on the 23rd January, 1931, that a plea was put forward as follows: "Such *paris* at temples are not attachable and saleable according to law." This was somewhat modified by a statement further down in the same pleading: "The properties in dispute consist of *paris* at temples which are *not usually* attachable and saleable according to law."

Now a certain number of rulings have been produced on each side. For the appellant reliance was placed on the case of *Durga Prasad v. Shambhu* (1), which was a ruling in regard to the *birt* of a mahabrahman and it was held that the *birt* of a mahabrahman is a right to

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(1) (1919) I.L.R., 41 All., 656.

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personal service and cannot be sold in execution of a decree for money. That was a ruling of the year 1919. It may be pointed out that the functions of a mahabrahman as described in the ruling are those of personal service. "This *birt*, as we understand it, is the office of a mahabrahman who officiates at funerals of Hindus and performs certain ceremonies." The next ruling on which learned counsel relied was the case of *Puncha Thakur v. Bindeswari Thakur* (1). In that it was held that certain rights cannot be transferred because they are *res ex'ra commercium*; for instance sacerdotal office which belongs to the priest of a particular class. Similarly a right to receive offerings from pilgrims resorting to a temple or shrine is inalienable. The chance that future worshippers will give offerings is a mere possibility and as such it cannot be transferred. In the case of *Raghunath Vi'hal Bhat v. Shrimant Purnanand Saraswati* (2) it was held that the duties of a hereditary office and the emoluments appertaining thereto remain in the family of the original grantee. If one of the members of the family wishes to get rid of his duties as well as his rights, he can only do so in favour of remaining members of the family. The alienation of the share of one member of the family to an outsider is invalid even if made in favour of the original grantor of the office. That was a case of an alienation of the rights of a pujari who had been appointed by a guru. Learned counsel further relied on the case of *Nitya Gopal Banerjee v. Nani Lal Mukherjee* (3). There was an alienation in that case of a *pala* or turn of worship apart from the *debutter* land, and evidence was adduced of instances of alienation along with the *debutter* land. It was held as a finding of fact that no custom of alienating the *pala* or turn of worship apart from the *debutter* land was established and that such an alienation was unreasonable. On the other hand reliance was placed for

(1) (1915) I.L.R., 43 Cal., 28.

(2) (1922) I.L.R., 47 Bom., 529.

(3) (1919) I.L.R., 47 Cal., 990.

the respondent plaintiff on the case of *Digambar Taty Utpat v. Hari Damodar Utpat* (1), where it was held that the interest of an *utpat* or priest's share in the net balance of the offerings to the deity can be attached and sold in execution of a decree. The ruling stated that those rulings on which the appellant relied, which referred to the right of the officiating priest to worship the idol directly and to receive the offerings directly, were in the opinion of the Court clearly distinguishable from the question of whether a share of the offerings could be transferred. In the case of *Sukh Lal v. Bishambhar* (2), a ruling of 1916, it was held that the rights of mahabrahmans could be mortgaged, and in the case of *Lokya v. Sulli* (3) it was held that "*birt jajmani*" was heritable and transferable. In the case of *Raghubar v. Mst. Rukmin* (4) a distinction was drawn between the office and the receiving of a share of offerings. We consider that the case which governs the matter is that of *Balmuhand v. Tula Ram* (5). In that case, at page 399 of the report, it has been laid down as follows: "A distinction must be drawn between cases in which emoluments are attached to a priestly office, and the cases in which the offerings are made to a deity and the persons who receive the same have not to render services of a personal nature as a consideration for the receipt of the offerings. The emoluments of the former kind are not, in the absence of a custom or usage to the contrary, ordinarily transferable, for the simple reason that they are inseparably connected with a priestly office and it is contrary to public policy to allow such offices to be transferred to a person not competent to perform the worship, either by private sale or by sale in execution of a decree." And on page 400: "But when the right to receive the offerings made at a temple is independent of an obligation to render services involving qualifications of a personal nature, such as officiating at the

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(1) A.I.R., 1927 Bom., 143.

(2) (1916) I.L.R., 39 All., 196.

(3) (1920) I.L.R., 43 All., 35.

(4) (1917) 20 Oudh Cases, 265(267).

(5) (1927) I.L.R., 50 All., 394.

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worship, we are unable to discover any justification for holding that such a right is not transferable. That the right to receive the offerings, when made, is a valuable right and is property, admits of no doubt, and therefore that right must, in view of the provisions of section 6 of the Transfer of Property Act, be held to be transferable, unless its transfer is prohibited by the Transfer of Property Act or any other law for the time being in force." We adopt this doctrine and accordingly we apply this rule of law to the present case. In the present case learned counsel for the appellant relied on the fact that in the sale deed it was stated: "and the *paris* (turns) of officiating at the worship of deities specified below and taking offerings made at them". Now it is to be noted that this is merely in the recitals and that when the operative portion of the sale deed is examined it does not say more than that there is a transfer of one-fifth share in the houses, the turns of the worship of the deities and the fixed-rate cultivatory holdings. It is not stipulated that the transferee should take part himself in the worship of the deities nor is there any mention of personal service. In the evidence of Nand Kumar, the appellant, there is no statement made that there is any necessary connection between the receipt of this share of the offerings and the actual performance of any worship. On the contrary he says: "There are 18 or 20 servants who look after the *paris* on our behalf. About four or five of them are regularly paid 7 or 8 rupees per month. The remaining servants get something out of the offerings." One of these servants has been produced, Ganesh, and he states: "I am in the service of Nand Kumar and look after his *paris*. . . . I get Rs.10 a month. There are two or four other servants who are also getting Rs.10 per month." Evidence was given in regard to Kameshwar and it was stated that he was a profligate person, as his brother the appellant says, and there is no statement made by the appellant that Kameshwar himself did perform any

service. We consider therefore that in the present case it has not been proved that there is any connection between the receipt of this share of the offerings and the performance of the service in the temples. No doubt in certain cases such a connection has been proved in regard to other temples; for example in the case of *Haridas Haldar v. Charu Chandra Sarkar* (1) it was held that at the temple at Kalighat in Calcutta there was such a connection and therefore that a transfer must be made to a limited class and that these rights to a share of the offerings were attachable in execution of a civil court decree but the sale must be to a limited class. In the present case it has not been proved that there is any such custom or connection between the share of the offerings and the right to officiate as priest. Accordingly we do not consider that the decree granted by the lower court to the effect that the property is liable to attachment and sale should be in any way modified.

Learned counsel for the appellant has argued a point of law which is not in the grounds of appeal and was not in his written statement. The point is that although the respondent can have the right of collections which had been received during the life time of Kameshwar and which might be attachable in execution of the decree against his assets, still the share of the offerings could not be attached as those offerings were future income to accrue. We do not think that this argument can be accepted, for various reasons. For one reason the execution is sought against the assets of Kameshwar Panda in the hands of his daughter, defendant No. 2. What was in the hands of defendant No. 2, the daughter of Kameshwar, was by inheritance his share, and as the share produced a certain annual income that income may be attached as it is one of the assets of the deceased. Secondly the appellant has no right to put forward such a claim as he has not put forward any claim that he is

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entitled to any share by inheritance from the deceased.  
For these reasons we cannot agree with this argument.  
We therefore dismiss this appeal with costs.

Before Sir Shah Muhammad Sulaiman, Chief Justice,  
and Mr. Justice Bennet

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AMIR AHMAD AND ANOTHER (DEFENDANTS) v. MUHAMMAD  
EJAZ HUSAIN AND OTHERS (PLAINTIFFS)\*

*Muhammadian law—Wakf—Mussalman Wakf Validating Act  
(VI of 1913), section 2(1)—What property can be made a wakf  
of—Right and interest of a grove-holder.*

The definition of wakf as given in section 2(1) of the Mussalman Wakf Validating Act, 1913, shows that any property, whether movable or immovable, can be made a wakf of, provided there is a permanent dedication of it. The definition is quite general in its character and would certainly include a wakf of full grove-holder's rights over which the grove-holder has a permanent dominion, although he is not the proprietor of the land; the subject-matter of the wakf need not necessarily be the full proprietary interest in immovable property. The rights of a grove-holder as now recognized by the Tenancy Act are not rights of a temporary character; the grove can be maintained, by replacing all fallen trees by new ones, and in that way the land can retain its character as a grove for ever and be in the possession and enjoyment of the grove-holder and his heirs and transferees. There seems to be nothing even in the strict Muhammadian law against the dedication of such permanent rights which amount to a permanent occupation of the land and full proprietary rights over the trees.

Mr. Shiva Prasad Sinha, for the appellants.

Mr. M. A. Aziz, for the respondents.

SULAIMAN, C.J., and BENNET, J.:—This is a defendants' appeal arising out of a suit for recovery of possession of certain lands with trees standing upon them, on the allegation that the plaintiffs are mutwallis under a deed of wakf dated the 8th of April, 1916, executed by one Iftikhar Uddin and the defendants are trespassers who have taken a sale deed from the widow of the deceased.

\*Second Appeal No. 1054 of 1931, from a decree of Zamirul Islam Khan, Subordinate Judge of Budaun, dated the 25th of June, 1931, reversing a decree of K. C. Dhaun, Munsif of East Budaun, dated the 19th of May, 1930.



ed Iftikhar Uddin. The first court held that the deceased had only occupancy rights in the land and was not the full proprietor of the site and therefore thought that the wakf of the grove was invalid according to the Muhammadan law. On appeal the lower appellate court has come to the conclusion that although Iftikhar Uddin was originally an occupancy tenant of the site he had acquired the interest of a grove-holder in the grove standing upon the lands, which interest was transferable and was of a permanent character. The court has accordingly held that inasmuch as he had the right to maintain the grove and replace old trees by planting new trees for ever, his rights could be dedicated.

The wakf was made professedly under the Mussalman Wakf Validating Act, Act VI of 1913. We must in second appeal accept the finding that the wakif had acquired the full rights of a grove-holder and was not a mere occupancy tenant of the lands, and further that his rights were transferable. There can be no doubt that the wakif had full dominion over such rights which he could transfer in any way he liked, although the ownership of the site did not vest in him and could not be transferred by him. At the same time he and his heirs had the right to maintain the grove on the land for all time and they were not liable to ejectment at the will of the zamindar of the lands.

The question raised in appeal is that the Muhammadan law contemplates that the property which is the subject-matter of wakf should be in the full proprietorship of the wakif and anything short of that is not capable of being made a wakf of. This proposition is too broadly stated. No doubt the essence of a wakf is its permanent character. Any property which is temporarily or for a limited period or without right in the possession of the wakif cannot be validly dedicated because such a dedication can never be of a permanent character. But it does not follow that the subject-matter of the wakf must necessarily be the full proprietary interest in im-

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movable property. On the other hand, although there was at one time some difference of opinion, this Court in *Abu Sayid Khan v. Bakar Ali* (1) held that according to the Mussalman law a wakf of even movable property could be validly constituted. The learned Judges expressly dissented from the view expressed in Calcutta in *Fatima Bibee v. Ariff Ismailjee Bham* (2). There is even authority for the proposition that moneys and shares in Joint Stock Companies and other modern forms of investments might well be the subject-matter of a valid wakf.

All difficulties that might have arisen under the strict Muhammadan law are now removed so far as wakfs governed by the Mussalman Wakf Validating Act is concerned. In section 2(1) "wakf" is defined as "the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable." This definition is practically reproduced in section 2(e) of the Mussalman Wakf Act (Act XLII of 1923) also. It obviously follows that a wakf can be made of movable just as well as of immovable properties and that in fact "any property" can be made wakf of, provided there is "a permanent dedication" of it, and provided further that the object of the wakf is a purpose recognized by the Mussalman law as religious, pious or charitable. We think that the definition of "wakf" as given in this enactment is quite general in its character and would certainly include a wakf of full grove-holder's rights over which the grove-holder has a permanent dominion. The rights of a grove-holder as now recognized by the Tenancy Act are not rights of a temporary character; nor is he liable to ejectment arbitrarily. So long as the grove-holder and his heirs and transferees maintain the grove and the land does not lose its character of a grove, even the old trees when they fall down can be replaced by new ones and in that way the land can retain its

(1) (1901) I.L.R., 24 All., 190.

(2) (1881) 9 C.L.R., 66.

character as a grove for ever. There seems to be nothing even in the strict Muhammadan law against the dedication of such permanent rights which amount to a permanent occupation of the land and full proprietary right over the trees that stand on the land and also the right to maintain the grove as such on the land. The position in our opinion has been made still clearer by the definition of the word "wakf" in the Mussalman Wakf Validating Act, which has a very wide and comprehensive scope and must include the rights of a grove-holder.

We are, therefore, of the opinion that the plaintiffs are entitled to maintain the suit as trustees under the wakf of 1916. We accordingly uphold the decision of the lower appellate court and dismiss the appeal with costs.

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## TESTAMENTARY JURISDICTION

*Before Mr. Justice Harries*

ADMINISTRATOR-GENERAL (PETITIONER) v.  
A. M. BOWER (OPPOSITE PARTY)\*

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*Construction of document—Will—Bequest whether of absolute interest or of life interest—Bequest of house with a condition that if legatee sells during her life time she will have life interest in the money, with reversion to her daughters—Condition in restraint of alienation and repugnant to bequest—Succession Act (XXXIX of 1925), section 133.*

By his will the testator bequeathed his movable property to his wife during her life time, and after her death to his daughters in a specified manner; by another clause of the will he bequeathed his house, and any other immovable property which there might be, to his wife, but added a condition that "should my wife at any time wish to sell or dispose of the house she is hereby authorised to do so at a reasonable price and without detriment or loss to the estate and to invest the whole of the sale proceeds in Government promissory notes, and the interest thereof shall be enjoyed by my wife during her life time", and after her death the interest and the

\*Testamentary Suit No. 4 of 1935.

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principal was to go to his daughters in the same manner as was already specified in the case of the movable property. The widow remained in possession of the house till her death. The question arose whether this will gave her an absolute estate in the house or only a life estate.

*Held*, that having regard to the circumstances that the will dealt separately with the movable and the immovable property; that in the case of the former the testator in express terms gave his wife only a life interest whereas in the case of the latter the language used was different and it was not said that he gave her only a life interest; that the testator did not in terms say that the widow could not sell the house except upon certain definite conditions but only that if she should sell it then she would have only a life interest in the proceeds of sale; that he did not in any way limit her interest in the event of the house not being sold; that the only restriction imposed on the widow's right to deal with the house was in respect of her power of sale in her life time and not her power to dispose of it by will; it followed that the testator bequeathed to her an absolute interest in the house, though intending at the same time to annex a restriction on her rights as an absolute owner in the matter of disposing of the property during her life time, and intending that the gifts in remainder and gifts over were to arise only in the event of sale. Consequently the absolute interest in the house vested in the widow and she was the full owner of it.

The provisions in the will depriving the widow of her absolute interest in the house in the event of her selling it were repugnant to the devise or bequest itself and were void. The ulterior gifts which were to take effect upon the happening of the sale were therefore void, but that could not affect the validity of the prior bequest, according to section 133 of the Succession Act.

Messrs. O. M. Chiene and D. N. Sanyal, for the petitioner.

Dr. K. N. Katju and Mr. Balmakund, for the opposite party.

HARRIES, J.: This is a suit brought by the Administrator-General of the United Provinces for a grant of Letters of Administration *de bonis non* to the estate of James William Twalling deceased, with a copy of the will annexed. The opposite party denies the right

of the petitioner to obtain such a grant, alleging that the estate of James William Twalling deceased has been completely administered.

The material facts of the case and all the relevant documents have been admitted on the pleadings or by counsel for both parties before me during the hearing, and, that being so, it was unnecessary to call any evidence on behalf of either of the parties. The issue involved in this case is a purely legal one, viz., the true construction to be given to a devise or bequest of certain real or immovable property contained in the will of James William Twalling deceased.

James William Twalling, a Government pensioner residing in the cantonments at Meerut, died on the 4th of September, 1893, leaving a will dated the 17th of October, 1887. He left surviving him his widow Mrs. Eliza Rebecca Twalling and three daughters, viz., Miss Grace Edith Twalling, Mrs. Walker and Mrs. Fink. The latter appears to have greatly displeased the testator during his life time and she is expressly deprived in the will of any share in the property left by the testator.

By the terms of this will the testator revoked all previous wills and appointed his widow sole executrix thereof. After a direction to the executrix to pay all just debts, funeral and testamentary expenses the testator proceeds to dispose of his property, dealing separately with his personal and real property.

The bequests of his personal or movable property read as follows: "I give, devise and bequeath all my personal property which I have acquired or may acquire by purchase or otherwise at any time before my decease such as jewellery, silver plate, household furniture, fittings up, carriages and horses and all and every sum or sums of money which may be in my house or due to me at the time of my decease, as also all stock, funds, Government promissory notes commonly called company's paper, and other securities unto my

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beloved wife Eliza Rebecca Twalling who shall enjoy the income, dividends, interests and profits thereof during her life time only and after her decease shall pay and apply the same income, dividends, interests and profits towards the maintenance and support of such of my daughters as shall from time to time be sole and unmarried, and after the marriage or decease of my last unmarried daughter shall divide my said personal property in equal shares among such of my daughters as shall then be living, except my daughter Alice Eliza Fink whom I exclude altogether from this will as her conduct has been most disgraceful."

With regard to his real or immovable property he makes the following provisions: "I also give, devise and bequeath to my said beloved wife Eliza Rebecca Twalling all that messuage, tenement or dwelling house with outoffices, wells, rights of way and appurtenances, purchased by me from the estate of the late George Beau of Saharanpur and being situate in Hill or Barrack Street No. 123 in the cantonment of Meerut and butted and bounded as described in the deed of sale dated the 16th of December, 1878, as also every other real property whether in reversion, remainder or expectancy. Should my said beloved wife Eliza Rebecca Twalling at any time wish to sell or dispose of the said house she is hereby authorised to do so at a reasonable price and without detriment or loss to the estate and to invest the whole of the sale proceeds of the said house in Government promissory notes, commonly called company's paper, and the interest thereof shall be enjoyed by my said beloved wife Eliza Rebecca Twalling during her life time only and after her decease the same interest shall be paid and applied towards the maintenance and support of such of my daughters as shall from time to time be sole and unmarried and after the marriage or decease of my last unmarried daughter the amount of the said Government promissory notes commonly called company's paper shall be divided in equal shares among

such of my daughters as shall then be living, except my daughter Alice Eliza Fink who is mentioned in the second clause of this will."

Probate of this will was granted to the widow Mrs. Twalling on the 14th of October, 1893, and thereafter she continued to reside in the Meerut cantonments in the house mentioned in the will (now referred to as "Park View") until her death on the 14th of July, 1900. Mrs. Twalling left no will, and Letters of Administration to her estate and to any unadministered portion of the estate of her husband the late James William Twalling were granted to the unmarried daughter Miss Grace Edith Twalling on the 29th of November, 1900. The Letters of Administration to any unadministered portion of the estate of her late father were granted to Miss Twalling upon the assumption that her mother Mrs. Twalling deceased had only a life interest in the house in question and that after her decease Miss Twalling had a limited interest only in this house liable to be defeated in certain events. For the purposes of granting Letters of Administration to Miss Twalling it was not necessary to construe the will of James William Twalling deceased and it is not contended that any decision has been given on this will by the court granting Letters of Administration which can in any way operate as *res judicata* between the present parties.

Miss Grace Twalling continued to reside in the old family residence "Park View" and it is now alleged that she spent large sums of money upon it to maintain it in a habitable condition. This fact, however, is not admitted by the petitioner and no evidence was called to establish it. No decision upon this issue, however, is necessary as it cannot affect my ultimate decision in this case.

Mrs. Walker died on the 6th of March, 1920, and Mrs. Fink also died some time subsequent to the death of Mrs. Twalling and before the death of Miss Grace Edith Twalling, which occurred on the 20th of Novem-

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ber, 1933. At the date of her death Miss Twalling resided at "Park View" and by her will dated the 24th of May, 1932, bequeathed the whole of her property to the opposite party Mrs. Bower, who obtained probate of the said will on the 24th of March, 1934. Mrs. Bower, it is to be observed, is the eldest daughter of the late Mrs. Fink who had been expressly excluded from any share in her father's property.

It is the case for the petitioner that Mrs. Twalling and after her death Miss Grace Edith Twalling were only life tenants of the house now known as "Park View" and that on the death of the latter no interest in it could pass under the will to the opposite party. As I have pointed out previously, Miss Twalling was the last surviving daughter of James William Twalling deceased and in the events that have happened it is contended that the bequest or legacy lapsed and that the house now forms part of the estate of James William Twalling deceased which has not been disposed of by his will. For that reason the present claim to a grant *de bonis non* with the will annexed is made.

On the other hand the opposite party contends that the will of James William Twalling deceased gave the widow Mrs. Twalling an absolute interest in the house which passed to Miss Twalling as her administratrix. As the latter at the date of her death had been in sole possession of the premises for 33 years it is contended that any rights vested in Mrs. Twalling's other children and their representatives are long since barred by limitation and that consequently at the date of her death Miss Twalling was the sole owner of the property and entitled to dispose of it by will.

If Mrs. Twalling was given an absolute interest in the property by the will under consideration the property cannot now form part of any unadministered portion of the estate of her husband. On the other hand if a limited interest only was given to Mrs. Twalling and after her death to Miss Grace Edith Twalling



it may well be that in the events that have happened there has been a lapse and that the house now remains undisposed of by the will of James William Twalling and is therefore a part of the latter's estate still unadministered. If the house is not disposed of by the will the petitioner is entitled to the grant prayed. It may be pointed out at this stage that the claim is limited to the house known as "Park View," as it is now admittedly impossible for the petitioner to trace and identify any of the personal property possibly undisposed of by the testator by his will.

The issues which were agreed between the parties are:

(1) On a correct construction of the will of the testator, the late Mr. J. W. Twalling, did any portion of the estate of the late James William Twalling remain unadministered at the death of Miss Grace Edith Twalling?

(2) Is the Administrator-General, U. P., entitled to Letters of Administration *de bonis non*?

The answers to the questions raised in these issues depend upon the true construction of the bequest of the immovable property contained in the will of the late James William Twalling, the terms of which I have set out in an earlier portion of this judgment.

As stated previously the will deals separately with the movable and immovable property. The widow is in terms given only a life interest in the personal or movable property and on her death detailed provisions are made for the devolution of the property. On the other hand the bequest of the real or immovable property differs very materially from that of the personal or movable property. The house is devised and bequeathed to the widow "as also every other real property, whether in reversion, remainder or expectancy". If the terms of the devise or bequest stopped there, the will would clearly confer upon the widow an absolute interest in the realty or immovable property, as it is

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provided by section 95 of the Indian Succession Act of 1925 that where property is bequeathed to any person such person is entitled to the whole interest of the testator therein unless it appears from the will that only a restricted interest was intended for him.

The matter is, however, complicated by the provisions which follow this bequest. By these provisions the testator imposes limitations on the widow's right to sell or dispose of the property and the wording of these provisions is somewhat strange. The testator does not in terms say that the widow cannot sell except upon certain definite conditions but what he does say is, that, should she at any time wish to sell or dispose of the said house she is authorised to do so at a reasonable price and without detriment or loss to the estate and in such case the proceeds of sale are to be invested and disposed of in precisely the same way as the personalty or movable property is disposed of in the earlier portion of the will. It is to be observed that these provisions dealing with a possible sale by the widow apply only to the house and not to any other real or immovable property, whether in reversion, remainder or expectancy, which might pass under this devise or bequest. The actual bequest to the widow covers the whole of the property, whereas the limitation sought to be imposed upon her power of sale is confined only to the house.

It has been strongly urged by counsel for the petitioner that the will only gave the widow a life interest in this house. It is argued that the provisions as to the devolution of the proceeds of sale of the house show a clear intention on the part of the testator to give the widow not an absolute interest but a limited interest, that is an interest for her life only. It is expressly provided by section 82 of the Indian Succession Act, 1925, that the meaning of any clause in a will is to be collected from the entire instrument, and all its parts must be construed with reference to each other. That being so, it is argued that it is clear that what the testator intended

was that the real or immovable property should pass in the same way as the personalty, that is, to the widow for her life, then to such daughter or daughters as were unmarried, and upon the marriage or decease of the last unmarried daughter to the surviving daughters equally, always excluding Mrs. Fink. It is urged that in construing the bequest of the house regard must be had to the terms of the previous bequests. In short, it is contended that when the will is regarded as a whole it is clear that the testator never intended his widow to have anything more than a life interest in the immovable property, or in any event in the house in question. If that was the intention of the testator it is extremely strange that he did not expressly say so. He had in an earlier portion of this will disposed of his personalty and had expressly created limited interests. He was careful to say that his widow was to have the income, dividends, interest and profits of his personal property during her life time only but he makes no such provision when dealing with his realty or immovable property. It is true that he gives her a life interest only in the proceeds of sale if and when the house is sold, but he does not in terms limit her interest in the event of the house not being sold. If he intended his immovable property to pass in the same way as his movable property why did he not use the same language as he had actually used earlier in the will to create limited interests in the personalty or movable property? The fact that he uses different language to dispose of two kinds of property strongly suggests that his intentions with regard to the movable and immovable property were not the same. However, he does make provisions for the devolution of the real property similar to those for the devolution of the personal property once the realty is converted into money or movable property and that suggests that he only intended the limited interests to take effect if the house was actually sold.

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Further, it is to be observed that the only restriction imposed on the widow's right to deal with the immovable property bequeathed to her is a restriction on her power of sale or disposition in her life time. Nothing is said as to what is to happen if the property remains unsold and there is nothing which expressly restricts her power to dispose of the property by will if not sold in her life time. In fact the will does not contain even an express prohibition against alienation. All it says is that if the widow desires to sell or dispose of the said house she may do so without loss to the estate, in which event she is expressly given a life interest and provision is made for the devolution of the proceeds of sale after her death. From this it may, I think, be legitimately inferred that the testator intended to take away the widow's unrestricted right of alienation *inter vivos*, but it is difficult to infer anything more from these provisions.

From the language used by the testator his intention is, in my judgment, tolerably clear. He intended his wife to take the house and other realty (if any) whilst at the same time imposing a restriction upon her power of selling or disposing of the house during her life time. In short, he intended to give her an absolute interest in the house and at the same time to take away from her one of the rights of an absolute owner, that is, the unrestricted right to dispose of the property at any time during such owner's life time.

To construe the provisions of the will dealing with the house as granting the widow a life estate only in it, will, in effect, be creating a new will for the testator. As the will stands the gifts in remainder and gifts over only arise in the event of sale, whereas I am asked by the petitioner to read this part of the will as granting the widow in every event a life interest only and after her death as creating interests similar to those granted in the case of the personal or movable property. To construe the will in this way is to do violence to the

words used in the will. The intention of the testator must be inferred from what he actually wrote and not from what a court thinks the testator intended to write. This is clear from the speech of Lord WENSLEYDALE in *Roddy v. Fitzgerald* (1): "These rules are perfectly plain and clear. The first duty of the court expounding the will is to ascertain what is the meaning of the words used by the testator. It is very often said that the intention of the testator is to be the guide, but that expression is capable of being misunderstood, and may lead to a speculation as to what the testator may be supposed to have intended to write, whereas the only and proper enquiry is, what is the meaning of that which he has actually written. That which he has written is to be construed by every part being taken into consideration according to its grammatical construction and the ordinary acceptance of the words used, with the assistance of such parol evidence of the surrounding circumstances as is admissible, to place the court in the position of the testator." This dictum has been approved of by their Lordships of the Privy Council in the case of *Venkatadri Appa Rao v. Parthasara'hi Appa Rao* (2).

In my judgment the only construction which does no violence to all the terms of this will is the construction contended for by the opposite party, which is that the devise or bequest of the house to the widow is a devise of an absolute interest but with a limited restriction on alienation *inter vivos* annexed to it. In the event of alienation *inter vivos* only is the widow's absolute interest cut down, and as she retained the property throughout her life she was at the date of her death the absolute owner of it.

In my judgment the will of James William Twalling deceased conferred upon his widow an absolute interest in the house which in the events that happened was never taken away from her, and that being so she was

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(1) (1857) 6 H.L.C., 823(876).

(2) (1925) I.L.R.. 48 Mad., 312.

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the absolute owner of the premises at the date of her death. Consequently the absolute interest vested in Miss Grace Edith Twalling as administratrix of her mother's estate and the house could never form part of an unadministered portion of the estate of James William Twalling deceased. As the present claim of the petitioner is expressly confined to the house it must fail as there is no unadministered portion of the estate in existence to which Letters of Administration can be granted. Had there been any traceable movable property which belonged to James William Twalling deceased different considerations would of course have arisen.

Further, the provisions depriving the widow of her absolute interest in the house in the event of her selling the property are, in my opinion, repugnant to the devise or bequest itself and must be disregarded. In the words of WILLES, J., in *Tagore v. Tagore* (1), "If, again, the gift were in terms of an estate inheritable according to law, with superadded words restricting the power of transfer which the law annexes to that estate, the restriction would be rejected, as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shown his intention to create, though he adds a qualification which the law does not recognize."

The absolute bequest and the condition divesting her of her absolute interest in the event of a sale are wholly incompatible and cannot stand together. Where there is a gift with a condition inconsistent with or repugnant to such gift the condition is wholly void and must be disregarded. That being so, the condition divesting Mrs. Twalling of her absolute interest in the property bequeathed to her, in the event of sale, is void. Other bequests were made upon the happening of this condition and the fact that these ulterior gifts are not valid

(1) (1872) 9 Beng. L.R., 377(395).

does not and cannot affect the validity of the prior bequest or gift; see section 133 of the Indian Succession Act.

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In my view the petitioner has wholly failed to show that this house is now a part of the estate of James William Twalling deceased left undisposed of by his will, and for the reasons which I have given above I dismiss this suit with costs.

Two further points have been argued on behalf of the opposite party, but it is unnecessary for me to express any opinion upon them as the points do not arise, having regard to the construction which I have given to the bequest or devise in question.

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The record together with the will was sent for at the request of the petitioner. By the rules of this Court the record together with the will must be returned by the clerk who was entrusted with their production and the petitioner must of course bear all the costs connected with the production and return of the record and the will.

## REVISIONAL CRIMINAL

Before Sir Shah Muhammad Sulaiman, Chief Justice,  
and Mr. Justice Mulla

EMPEROR v. BAIJNATH RAM\*

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*Municipalities Act (Local Act II of 1916), sections 184(2), 186, 209—Separate sanction necessary for constructions projecting over street or drain—General sanction to the building not sufficient—Private ownership of drain immaterial—Municipalities Act, sections 307, 318, 321—Notice to remove or stop constructions—No appeal made to District Magistrate, challenging lawfulness of notice—Notice can not be questioned in criminal court.*

Under section 180 of the Municipalities Act the Chairman of a Board can only accord a general sanction for the erection or re-erection of a building, but where such erection or re-erection involves the making of any constructions contemplated by section 209, the provision of section 184(2) comes into operation and makes it incumbent to obtain a separate sanction in respect of them under section 209, and such sanction can be given only by the Executive Officer.

The operation of clause (b) to section 209(1) of the Municipalities Act is not confined to public drains alone, and any person wishing to make a structure or projection over a private drain is also bound to obtain permission under that section, if the drain lies in a street as defined in the Act. The question of his title to the drain is quite immaterial in this respect.

The words "notice given under the provisions of this Act" in section 307 of the Municipalities Act mean that the notice in question should not merely profess to be under the Act but should have been given in compliance with the provisions of the Act. As a rule, therefore, a criminal court trying a charge under section 307 would be entitled to satisfy itself that the notice satisfies this condition. Section 318, however, lays down a special provision in the case of certain notices specified therein and in this respect controls the provisions of section 307. It follows, therefore, that where the notice which is the subject of a charge under section 307 happens to fall within one of the classes of notice provided for in section 318, the criminal court is prevented from entering into the question of its legality

\*Criminal Revision No. 181 of 1935, from an order of Vishnu Ram Mehta, Additional Sessions Judge of Ghazipur, dated the 5th of November, 1934.

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by virtue of the special provisions of the latter section. According to these provisions the only method by which a person aggrieved by a notice falling within the purview of section 318 can challenge the validity of that notice is by way of an appeal to the District Magistrate or other special officer appointed by the Local Government, and, if he fails to avail himself of that remedy, no other authority such as a criminal court trying a case under section 307 can question the validity of the notice. The legislature having provided a complete remedy by sections 318 and 319 against illegally issued notices of the classes enumerated in section 318, it deliberately ousted the jurisdiction of any other court or tribunal in that matter. *Emperor v. Har Prasad* (1), followed.

Mr. A. P. Pandey, for the applicant.

The Assistant Government Advocate (Dr. M. Waliullah), for the Crown.

SULAIMAN, C.J., and MULLA, J.:—This is an application in revision by one Baijnath Ram, a resident of Ghazipur, against his conviction by a Magistrate of two separate offences under sections 210 and 307 of the Municipalities Act (Act II of 1916), which has been upheld by the Additional Sessions Judge of Ghazipur. He has been fined Rs.10 for each offence.

The prosecution of the appellant in this case was launched in rather peculiar circumstances, from which it would appear that the municipal authorities at Ghazipur did not fully realise their responsibilities in dealing with these civic affairs. The applicant owned a double storeyed house abutting on a public road running through a market with a drain on each side. The house having been considerably damaged by the earthquake in January, 1934, the applicant decided to pull it down and to re-erect a new one instead. Accordingly, on the 15th of February, 1934, he gave a notice to the Municipal Board under section 178 of the Municipalities Act, attaching thereto a plan of the proposed building, as required by the rules. It is admitted that the plan showed a balcony or projection on the upper storey

(1) (1932) I.L.R., 54 All., 864.



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and a structure over the drain in the lower storey. The Chairman of the Board, who received the notice, called for a report in the ordinary course from the Municipal Health Officer, who inspected the locality and objected to the structure over the drain on sanitary grounds. In spite of that objection the Chairman proceeded to pass an order on the 25th of May, 1934, sanctioning the proposed building in accordance with the plan submitted by the applicant, with the direction that the structure over the drain should be so constructed as not to obstruct the cleaning and flushing of the drain. This sanction was endorsed on the back of the plan submitted by the applicant and was conveyed to him on the 28th of May, 1934. A very important point to be noted about this endorsement is that it was signed not only by the Chairman but also by the Executive Officer. Armed with this sanction, the applicant forthwith started the construction of the building in accordance with the approved plan. On the 5th of July, 1934, some employee of the Municipal Board made a report to the Executive Officer drawing his attention to the fact that in building the new house the applicant had constructed a balcony or projection on the upper storey and had also made some structure over the drain on the margin of the road. On this report the Executive Officer, who, as noted above, had put his signature on the sanction accorded to the applicant by the Chairman, proceeded to pass an order on the 18th of July, 1934, directing that a notice be issued to the applicant asking him to remove the balcony or projection. A notice was accordingly issued on the 23rd of July, 1934, but it was not served on the applicant until the 2nd of August, 1934. This notice was confined to the balcony or projection in the upper storey, and the applicant was directed to remove it. Another notice was, however, issued on the 2nd of August, and was served on the applicant on the same date, referring both to the balcony or projection and the structure over the drain and directing him to stop the construction of

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the front portion of his building. The fact that these notices were duly served on the applicant but he did not comply with them is not denied, though with reference to the latter notice directing him to stop further construction of the front portion of the building it is contended—and not without some force—that by the time it was served on him the construction of that portion had already been completed. On the 11th of August, 1934, a third notice was issued to the applicant asking him to show cause why he should not be prosecuted for failing to comply with the notice already served on him and why the balcony and the structure over the drain, which he had constructed without obtaining a proper sanction, should not be demolished. In answer to that notice, which was served on him on the 13th of August, the applicant protested that the construction in question had been made in accordance with the plan sanctioned by the Board and had been completed long before. The Executive Officer then proceeded to file a complaint against the applicant under sections 210 and 307 of the Municipalities Act, which ultimately resulted in his conviction as mentioned above.

The applicant's defence, which has been rejected by both the courts below, is, firstly, that the construction in question having been made in accordance with the sanction of the Board duly obtained by him he cannot be held guilty of an offence under section 210 of the Act; and, secondly, that the Board being bound by its own sanction had no power to get those constructions demolished, and hence the notices issued by the Board were not valid notices under the Act. With reference to one of those constructions, viz. the structure over the drain, it is further pleaded that the Board had no right of action, inasmuch as the drain was the private property of the applicant.

The trial court found (1) that having regard to the nature of the construction in dispute, the sanction obtained by the applicant was not a proper one, inas-

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much as it was his duty, under section 184(2) of the Act, to make a separate application for sanction in respect of those constructions which fell within the purview of section 209, and his failure to do so made him liable to the penalty provided for in section 210; and (2) that in view of the definition of "street" as contained in section 2(23), it must be presumed that the drain in question was part of the public road on which the applicant's house abuts, and that presumption had not been rebutted by the oral and documentary evidence produced by the applicant to support his alleged title.

The learned Additional Sessions Judge endorsed these findings and further pointed out by reference to the case of *Emperor v. Har Prasad* (1) that so far as the applicant's conviction under section 307 was concerned, he was not entitled to question the legality of the notices served on him in the present proceeding, because he failed to avail himself of the remedy specifically provided for that purpose by section 318 of the Act.

The contentions raised by the applicant in the courts below have also been pressed before us, but having fully examined them in the light of the relevant sections of the Act, we find that they have no force and have been rightly rejected. So far as the applicant's conviction under section 210 is concerned, the position appears to be quite plain. It cannot be denied that both the constructions in dispute are such as are contemplated by section 209. The sanction obtained by the applicant from the Chairman of the Board was obviously one under section 180, and could not validly cover those constructions. Under section 180, the Chairman of a Board can only accord a general sanction for the erection or re-erection of a building, but where such erection or re-erection involves the making of any constructions contemplated by section 209, the provision of clause (2)

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of section 184 comes into operation and makes it incumbent on the person desiring to make such constructions to obtain a separate sanction in respect of them under section 209; and in view of section 60 read with schedule II, such sanction can be given only by the Executive Officer. It is admitted that the applicant did not obtain any separate sanction for the constructions in dispute, as required by section 184(2) read with section 209; and hence it is clear that he made those constructions without the permission required by section 209, and thereby committed an offence under section 210. It has, however, been strenuously contended on behalf of the applicant that in the circumstances of the present case we ought to hold that the sanction obtained by the applicant from the Chairman amounted also to a sanction by the Executive Officer, who endorsed it by his signature, and hence it was not necessary for the applicant to obtain a separate sanction under section 209. We have given due weight to this contention, but we cannot allow it to prevail, even though we feel that the conduct of the Executive Officer was likely to mislead the applicant; firstly, because the language in which the sanction was couched clearly indicated that it was a sanction given by the Chairman alone, and secondly, because it was incumbent on the applicant to discharge the statutory obligation laid on him to obtain a separate sanction under section 209, and his failure to do so cannot be condoned merely on the ground that he was misled by the fact that the sanction obtained by him, which on the face of it had been given by the Chairman alone, also bore the signature of the Executive Officer. It has to be borne in mind that the applicant's liability under section 210 arises in respect of two separate constructions, one being a balcony or projection on the upper storey, and the other a structure over the drain in the lower storey. So far as the former construction is concerned, it is clear that the applicant did not obtain any separate sanction for it, as required by clause (a) to

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section 209, and hence there can be no doubt that in erecting it he committed an offence under section 210. With reference to the latter construction it is, however, urged on behalf of the applicant that the Board had no right of action, because the drain, over which that construction was made, was his private property. Having regard to the clear language of clause (b) to section 209, which obviously covers that construction, we find that the applicant's contention is entirely beside the point. The question of the applicant's title to the drain is quite immaterial, because there is absolutely no justification for supposing that the operation of clause (b) to section 209 is confined to public drains. All that is needed to attract the operation of that clause is that the drain, over which it is sought to make some structure or projection, should be situated in a street, which, according to section 2(23), "means any road, bridge, footway, lane, square, court, alley or passage which the public or any portion of the public has a right to pass along, and includes, on either side, the drains or gutters and the land up to the defined boundary of any abutting property, notwithstanding the projection over such land of any verandah or other superstructure." It clearly follows, therefore, that any person wishing to make a structure or projection over a private drain is bound to obtain permission therefor under section 209(b), provided the drain lies in a street. The policy behind this provision is quite obvious. The filthy condition of a drain lying in a street may be a source of great danger to public health, and the municipal authorities being charged with the duty of maintaining public health have consequently been armed by the legislature with the power of controlling the construction of any structure or projection which might be calculated to prevent the proper cleaning of such a drain. It cannot be denied in the present case that the drain, over which the construction in question has been made, lies in a street

within the definition of that term as contained in section 2(23). It follows, therefore, that even on the assumption that the drain was the applicant's property, it was his duty to obtain the permission necessary under section 209(b) in respect of the structure which he proposed to erect over it. We are, therefore, satisfied that the applicant has rightly been found guilty of an offence under section 210 in respect of both the constructions in dispute.

Turning now to the applicant's conviction under section 307 we find that it can rest on his non-compliance with any one of the two notices issued to him, one on the 23rd of July, 1934, directing him to demolish the balcony or projection in the upper storey, and the other on the 2nd of August, asking him to stop further construction of his building. Both the courts below appear to have laboured under a misapprehension in dealing with the applicant's liability under section 307. The trial court seems to have been under the impression that all the notices issued to the applicant directed him to stop the construction of the building, and it was his failure to do so which made him liable to the penalty prescribed by section 307. The appellate court on the other hand proceeded on the assumption that all the notices had been issued under section 211 directing the applicant to demolish the construction over the drain. None of these two positions is, however, correct, for on a careful examination of the record we find that there were in fact only two notices on which the prosecution could have based the charge under section 307. One of them, dated the 23rd of July, was confined to the balcony or projection in the upper storey and directed the applicant to remove it within a week; while the other, dated the 2nd of August, though it referred both to the balcony and the structure over the drain, only asked the applicant to stop the construction of the front portion of the house. The fact, however, remains that the applicant's conviction under section 307 cannot be

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interfered with if it is found that it rests validly on his non-compliance with either of these two notices. The contention on behalf of the applicant is that these notices were not issued under the provisions of the Act in the sense that the conditions necessary under the Act to justify the issuing of such notices had not been fulfilled, and hence the applicant could not be validly convicted under section 307.

Now we find that so far as the first notice is concerned the position is quite clear and the applicant's contention has no force. That notice was undoubtedly issued under section 211 of the Act and directed the applicant to remove the balcony or projection in the upper storey which he had constructed without obtaining a separate sanction for it as required by section 209(a) read with section 184(2) of the Act. In these circumstances we fail to see how it is possible for the applicant to challenge the legality of that notice and to contend that it was not issued under the provisions of the Act as required by section 307. The applicant's failure to comply with that notice was clearly an offence under section 307, and it is not, therefore, possible to interfere with his conviction under that section in respect of the said notice. In view of this finding it is not really necessary for us to enter any further into the question of the propriety or otherwise of the applicant's contention under section 307, but, as his contention in respect of the other notice is calculated to raise a doubt as to the correctness of the decision of this Court in the case of *Emperor v. Har Prasad* (1), which has also found expression in some other cases of this Court decided by single Judges, we consider it advisable to analyse that contention in order to set the conflict at rest.

The other notice, which directed the applicant to stop further construction of the building, could not possibly have been issued under section 211 of the Act, for that

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section contains no such provision. The only other section under which such a notice could have been issued is section 186 which runs as follows: "The Board may at any time by written notice direct the owner or occupier of any land to stop the erection, re-erection or alteration of a building or part of a building \* \* \* in any case where the Board considers that such erection, re-erection, alteration, construction or enlargement is an offence under section 185." Now an offence under section 185 is committed only where a person "begins, continues or completes the erection or re-erection of, or any material alteration in, a building or part of a building . . . without giving the notice required by section 178 or in contravention of the provisions of section 180, sub-section (5), or of an order of the Board refusing sanction, or any written directions made by the Board under section 180 or any bye-law." In the present case it is admitted that the applicant not only gave the notice required by section 178 but also obtained a sanction under section 180, sub-section (5) to erect the building in accordance with the plan submitted by him. It is, therefore, clear that he had not committed any offence under section 185 and no notice asking him to stop further construction of the building could validly be issued to him under section 186. The question now arises as to whether the applicant was entitled to challenge the validity of that notice in the trial court in order to avoid the penalty for non-compliance prescribed by section 307. That question has been answered in the negative in the case of *Emperor v. Har Prasad* (1), which rests on an interpretation of sections 318 and 321 of the Act. Section 318 provides that any person aggrieved by a notice or direction given under certain sections of the Act including section 186 may appeal to the District Magistrate or to such officer as the Local Government may appoint for the purpose of hearing such appeals. Section 321 definitely lays

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down that "No order or direction referred to in section 318 shall be questioned in any other manner or by any other authority than is provided therein." The learned Judges of this Court who decided the case of *Emperor v. Har Prasad* (1) have interpreted these sections to mean that the only method by which any person aggrieved by a notice under section 186 can challenge the validity of that notice is by appealing to the authority provided in section 318, and if he fails to do so, no other authority such as a criminal court can question the validity of the notice. The learned Judges have further held that there is nothing in the language of section 307 to indicate that it is the duty of the criminal court trying a case under section 307 to satisfy itself that the notice has been lawfully issued, and in support of that conclusion have pointed out that the language of section 307 is quite different from that of the corresponding section 147 of the old Municipalities Act which made it incumbent on the trial court to satisfy itself that the notice relied upon by the prosecution had been lawfully issued. The contention on behalf of the applicant is that this view does not take into account the full effect of the words "under the provisions of this Act" at the very beginning of section 307 which ought to be interpreted to mean that the notice in question should not merely profess to be under the Act but should have been given in compliance with the provisions of the Act. We have no hesitation in holding that this interpretation is correct, but we find that it does not necessarily lead to the conclusion that the view taken by the learned Judges in the case of *Emperor v. Har Prasad* (1) is open to any doubt. It must be noted that section 307 embodies a general provision in respect of any notice given under the provisions of the Act or under a rule or bye-law to a person, requiring him to execute a work in respect of any property movable or immovable, public or private, or to provide or

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do or refrain from doing anything within a prescribed time. As a rule, therefore, a criminal court trying a charge under section 307 would be entitled to satisfy itself that the notice in question has been given in compliance with the provisions of the Act or some rule or bye-law. Section 318, however, lays down a special provision in the case of certain notices specified therein and has the effect of withdrawing them from the ambit of section 307. It provides certain exceptions to the general rule laid down in section 307 and must, consequently, control the provisions of that section. It would follow, therefore, that where a notice, which is the subject of the charge under section 307, happens to fall within one of the exceptions provided in section 318, the criminal court is prevented from entering into the question of its legality by virtue of the special provisions of the latter section. Now section 318 clearly provides that the legality of a notice falling within its purview can be challenged by way of an appeal to the District Magistrate or to some officer specially appointed by the Local Government for that purpose. The fact that the legality of a notice falling within the purview of section 318 can be challenged in appeal is quite evident from section 319 which runs as follows: "If on the hearing of an appeal under section 318 any question as to the legality of the prohibition, direction, notice or order arises on which the officer hearing the appeal entertains reasonable doubt, he may, either of his own motion or on the application of any person interested, draw up a statement of facts of the case and the point on which the doubt is entertained, and refer the statement, with his own opinion on the point, for the decision of the High Court." The section further provides that where a reference is made to the High Court, the subsequent proceedings in the case shall be governed by the provisions of order XLVI of the Civil Procedure Code or such other rules as are made by the High Court under section 122 of that Code. It is clear from the above

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that a person aggrieved by a notice covered by section 318 has been provided by the law with a complete opportunity of challenging the legality of that notice, first in appeal before the District Magistrate or other special officer appointed by the Local Government and again by way of reference to the highest court. There is consequently nothing anomalous or shocking to the sense of justice in the provision made by section 321 that "No order or direction referred to in section 318 shall be questioned in any other manner or by any other authority than is provided therein." The only possible interpretation of this section is that the legislature, having provided a complete remedy to the aggrieved person under sections 318 and 319, deliberately ousted the jurisdiction of any other court or tribunal. We may also note here that section 321 gives a further chance to the aggrieved person to apply for a review of the order passed by the appellate authority if it happens to be adverse to him. Having regard to all these provisions, we have arrived at the same conclusion as the learned Judges who decided the case of *Emperor v. Har Prasad* (1), that the only method by which a person aggrieved by a notice falling within the purview of section 318 can challenge the validity of that notice is by way of an appeal to the District Magistrate or other special officer appointed by the Local Government, and, if he fails to avail himself of that remedy, no other authority such as a criminal court trying a case under section 307 can question the validity of the notice. The result, therefore, is that the applicant's conviction under section 307 can validly rest on his non-compliance with both the notices referred to above, for though one of them falling under section 186 was illegal in the sense that it was not given in compliance with the provisions of the Act, yet its illegality could not be questioned by the criminal court in the present proceeding.

(1) (1932) I.L.R., 54 All., 864.

The case of *Kashi Prasad Verma v. Municipal Board, Benares* (1) is clearly distinguishable. No doubt section 164 is somewhat similar in language and provides that the liability to be assessed or taxed cannot be questioned "in any other manner or by any other authority than is provided in this Act". But a criminal court is one of the authorities referred to in the Municipalities Act itself for hearing complaints under section 155 of the Act, which section begins with the supposition that the goods are "liable to the payment of octroi", a fact which has to be established by the prosecution. On the other hand, section 321 lays down that "No order or direction referred to in section 318 shall be questioned in any other manner or by any other authority than is provided therein", and the civil court is nowhere mentioned in the Municipalities Act as a court of competent jurisdiction which can entertain an original suit, as distinct from a mere reference to the High Court.

We, therefore, uphold the applicant's conviction under sections 210 and 307 of the Municipalities Act, but in proceeding to consider the appropriate sentence in this case we feel constrained to notice the irresponsible conduct of the municipal authorities in dealing with him. The Chairman, who dealt with the applicant's notice under section 178, must have known that he was empowered only to grant a general sanction for the construction of a building under section 180 but had no authority to permit any construction falling within the purview of section 209. The plan attached by the applicant to the notice under section 178 clearly showed a balcony on the upper storey and a structure over the drain in the lower storey, both of which were clearly governed by section 209. It was, therefore, the duty of the Chairman to make it clear that the sanction which he had accorded had no reference to those constructions. We find on the other hand that he sanc-

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tioned the construction of the building in accordance with the plan submitted by the applicant and further made a reference to the structure over the drain which he had no power to sanction and directed that it should be so made as not to obstruct the cleaning of the drain. Again, the Executive Officer had no business to put his signature on the sanction given by the Chairman in the terms mentioned above, which he must have known was not valid under the Act. The whole proceeding was obviously calculated to mislead the applicant, and we cannot help feeling that he was actually misled by it. We find further that the applicant was allowed to proceed with the construction of the building for nearly two months before it was discovered by the Executive Officer, who had made himself a party to the invalid sanction, that the construction was being made without a proper permission. Taken as a whole the conduct of the municipal authorities in this case is in our opinion open to serious objection, and it is no excuse to say that the applicant must be presumed to know the law, for it is nonetheless reprehensible that they should first have misled him by their own act and should then have brought him to book for non-compliance with the law. The prosecution of the applicant in these circumstances may be technically correct but it has no moral justification behind it. We must, therefore, express our disapprobation of the conduct of the municipal authorities, and we propose to do so by reducing the sentence imposed on the applicant from Rs.10 to one anna for each offence.

The result, therefore, is that we uphold the applicant's conviction under sections 210 and 307 of the Municipalities Act and dismiss his application in revision but reduce the sentence imposed on him to one anna for each offence.

## REVISIONAL CIVIL

*Before Sir Shah Muhammad Sulaiman, Chief Justice,  
and Mr. Justice Bennet*

DANMAL PARSHOTAMDAS (PLAINTIFF) *v.* BABURAM  
CHHOTELAL (DEFENDANT)\*

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September,  
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*Partnership Act (IX of 1932), sections 69, 74(b)—Suit by un-  
registered firm against third party—Not maintainable—Im-  
material whether the right enforced by suit accrued before or  
after commencement of the Act—Subsequent registration of  
firm does not cure the defect—General Clauses Act (X of  
1897), section 6 (e).*

*Held, (SULAIMAN, C.J., dubitante) that a suit by an unregis-  
tered firm against a third party, filed after the coming into  
force of section 69 of the Partnership Act, is barred by that  
section, and section 74(b) of the Act does not operate to save  
the suit even if the right sought to be enforced by the suit is  
one which had accrued prior to the commencement of the Act.*

*Held, also, per BENNET, J., that the registration of the firm  
subsequent to the filing of the suit did not cure the defect.*

*Held, per SULAIMAN, C.J., that section 6(e) of the General  
Clauses Act applies to those cases only where a previous law has  
been simply repealed and there is no fresh legislation to take  
its place.*

Mr. S. N. Seth, for the applicant.

Dr. N. C. Vaish, for the opposite party.

BENNET, J.:—This is a civil revision by a plaintiff  
whose suit has been dismissed by the small cause  
court on the ground that the suit was brought by  
an unregistered firm and that section 1 and section  
69 of the Indian Partnership Act (Act IX of 1932) bar  
the suit. The plaint was headed "Firm Danmal  
Parshotam Das", through Sidh Gopal, one of the owners  
of the said firm. Section 69(2) is as follows: "No suit  
to enforce a right arising from a contract shall be  
instituted in any court by or on behalf of a firm against  
any third party unless the firm is registered and the  
persons suing are or have been shown in the Register of  
Firms as partners in the firm." The argument for the

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applicant in revision is that section 74 of the Act prevents section 69(2) from applying to the present case, and therefore the present plaint is a valid plaint. In this connection we may observe that section 1(3) provides in regard to the Act "It shall come into force on the 1st day of October, 1932, except section 69, which shall come into force on the 1st day of October, 1933." The Act therefore provided that this particular section 69, which requires that a suit shall only be instituted on behalf of a registered firm, was not to apply for a period of one year after the rest of the Act came into force. The conclusion to be drawn from this provision is that the legislature intended that an opportunity should be given to unregistered firms to be registered before the somewhat drastic provisions of section 69 were enforced against those firms. For the applicant Mr. Seth argued that this provision was only intended to operate in regard to causes of action which had arisen after the main portion of the Act came into force. It appears that this would be a very small matter as it is not common for a suit to be brought in regard to a cause of action arising within one year from the suit; at least so far as suits on contracts are concerned. It is more probable that the provision in section 1, subsection (3) was intended to have a wider effect and to apply to all suits which an unregistered firm desired to bring within one year after the main provisions of the Act came into force.

The argument of learned counsel for applicant was in regard to the meaning of section 74, and especially of the first three clauses (a), (b) and (c), which state as follows: "Nothing in this Act or any repeal effected thereby shall affect or be deemed to affect (a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or (b) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability, or anything done or suffered before the commencement of



this Act, or (c) anything done or suffered before the commencement of this Act." Now learned counsel for the applicant in revision argued that the meaning of section 74, sub-section (b) was that any legal proceeding or remedy in respect of a right, title, interest, obligation or liability which had been mentioned in sub-section (a), which was a right, title, interest, obligation or liability accrued or incurred before the commencement of the Act, would be altogether barred from the provisions of section 69. That is, he argued, that a suit could be brought at any time even many years after 1933, if the right, title, interest, obligation or liability had been acquired, accrued or incurred before the commencement of the Act. His argument was that the last two lines of section 74, sub-section (b), must be read apart from the rest of the section; that is, the words "anything done or suffered before the commencement of this Act" formed an entirely separate clause and that the words "before the commencement of this Act" did not modify any "legal proceeding or remedy". There are several points to be noted in regard to this theory. The conclusion which learned counsel desires to draw is that if the words "any legal proceeding or remedy" are not limited to any legal proceeding or remedy before the commencement of the Act, then the legal proceeding or remedy need not follow the procedure of the Act and in particular the procedure of section 69(2). Now, in the first place, even taking the interpretation of learned counsel, his conclusion is not a necessary result. The section may mean that a right will exist to take a legal proceeding or remedy, which is a vested right which came into existence before the Act. But it does not follow that the legal proceeding or remedy should not follow the procedure laid down by the Act. In other words the section deals with substantive rights and does not deal with legal procedure. In my opinion if the sub-section 74(b) was intended to deal with procedure it would begin "(b)

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the procedure in any legal proceeding or remedy". It appears to me that the word procedure does not go well with the word remedy, and this is another reason why I think that the word "procedure" cannot be understood in this sub-section (b). The view which I take is that on this construction put forward by learned counsel the section merely lays down that for any right, title, interest, obligation or liability mentioned in (a), or for anything done or suffered before the Act, there will always be a legal proceeding or remedy, but such a legal proceeding or remedy must be taken in accordance with the Act. The second point is that this view that section 74 refers to substantive rights only and not to rules of procedure is supported by the analogy of the General Clauses Act (Act X of 1897), section 6. In section 5 it is stated that where an Act has been repealed the repeal shall not "affect any investigation, *legal proceeding or remedy* in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid". The words "any such right etc." refer to the right etc. in section 6(d). Similarly the words "any such right" in section 74(b) of the Partnership Act refer to the right etc. in sub-section (a). There is a parallel between the two provisions in the two Acts. And decisions have always held that under the General Clauses Act for matters of procedure a new Act must always be followed in the "legal proceeding or remedy", but any right etc. which has already accrued under the Act which has been repealed will remain.

On the theory of learned counsel for the applicant if a mortgage was executed before the present Code of Civil Procedure which came into force in 1908, a suit on that mortgage after 1908 would not be governed by the present Code of Civil Procedure but by the former Code. No ruling to this effect is produced by learned counsel. On the other hand, in regard to the Partnership Act there are two rulings which are produced against him. One of

these rulings is contained in the case of *Surendra Nath De v. Manohar De* (1), and is a ruling of a Bench of the Calcutta High Court. On page 216 it is stated in regard to section 74(b): "But the words 'before the commencement of the Act' may be taken also as referring to the legal proceedings or remedy in respect thereof. If the collocation of the words is in itself precise and unambiguous, no difficulty arises; but, if the terms are ambiguous, then the intention of the legislature must be sought for in the statute as a whole. As already pointed out, the other sections in the Act would go to indicate that the intention of the legislature was to bring section 69 into operation against the firms, if they do not register themselves or if they do not take proceedings respecting antecedent matters within a year from the date of the commencement of the Act. Section 74, clause (b), therefore, does not save litigation started after the 1st day of October, 1933." The matter has also been before a learned single Judge of this Court in the case of *Ram Prasad Thakur Prasad v. Kamta Prasad Sita Ram* (2). The learned single Judge took the same view of section 74 and held that a suit brought after the 1st of October, 1933, by an unregistered firm was barred by section 69 of the Partnership Act. I consider that these two rulings should be followed, and that the provisions of section 74 of the Partnership Act are intended to apply to substantive rights and not to matters of procedure and that the procedure laid down by section 69 must be followed in a suit which is filed after the 1st of October, 1933.

One further point arises in regard to this case, and that is that learned counsel points out that on the 27th of June, 1934, the firm did become a registered firm and the certificate was filed in court on the 27th of July, 1934, that is, two days before the case was heard. He accordingly makes an oral request that he should be

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(1) (1934) I.L.R., 62 Cal., 213.

(2) A.I.R., 1935 All., 898.

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allowed to amend his plaint. No such application was in his grounds of revision, which merely stated in ground No. 3, "Because the registration certificate having been filed during the pendency of the suit, any defect even if it existed was cured." The question arose before the learned single Judge of this Court, in the case cited above, in a form more favourable to the plaintiff, as in the case before him the plaint had been amended by the orders of the court, and the argument was that the suit should be deemed to have been instituted on that date. He held, however, that the terms of section 69 were imperative and that that section stated that "No suit . . . shall be instituted . . . unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm." I consider that this principle should be followed. Learned counsel argued that its parallel is to be found in section 17 of the Small Cause Courts Act. That provision however is for a defendant who is making an application for the restoration of a suit which has been decreed against him. The present case is more parallel to the provisions for the rejection of a plaint under order VII, rule 11 on the ground that the suit appears from the statement of the plaint to be barred by any law. Under rule 13 the remedy is to file a fresh plaint. Accordingly in the present case I think the remedy of the plaintiff is to file a fresh plaint so that no part of his plaint may be barred by limitation. I would therefore dismiss this civil revision with costs.

SULAIMAN, C.J.:—Undoubtedly it is a significant fact that as provided in section 1(3), section 69 came into force one year after the coming into force of the Partnership Act. The reasonable inference is that the enforcement of this section was deliberately postponed in order to give unregistered firms a reasonable chance to get themselves registered before the section began to operate against them. Accordingly if there were nothing else in

the Act it would be a legitimate conclusion that section 69 would apply to all suits filed after the expiry of the period of one year. But there is also a possibility that the intention was to allow time to people, trading under the name of an unregistered firm, to come to know of the drastic change in the law, which should affect all contracts entered into after the expiry of that period.

Again, the fact that section 69 *prima facie* enacts a rule of procedure is one which supports the inference that it should apply to all the suits filed after the expiry of one year.

If there were nothing else in the Partnership Act, section 69 would in terms apply to this case as it lays down that "No suit to enforce a right arising from a contract . . . shall be instituted in any court or by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been partner in the firm, unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm." But there is section 74, which provides that "Nothing in this Act or any repeal effected thereby shall affect or be deemed to affect (a) any right, title, interest, obligation or liability, already acquired, accrued or incurred before the commencement of this Act, or (b) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability, or anything done or suffered before the commencement of this Act, or (c) anything done or suffered before the commencement of this Act" etc. So the main question for consideration is whether the provisions of section 69 are not made subject to the provisions of section 74, which is a saving clause for the protection of persons who had acquired certain rights prior to the commencement of the Act.

There can be no doubt that the words "any such right" in sub-section (b) refer to "any right, title, interest, obligation or liability, already acquired, accrued or incurred before the commencement of the Act" mentioned in

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sub-section (a). Sub-section (b) must, therefore, read as "any legal proceeding or remedy in respect of any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or anything done or suffered before the commencement of this Act". It follows, therefore, that the legal proceeding or remedy referred to in sub-section (b) is in respect of any right, title, etc. which has already been acquired, accrued or incurred before the commencement of the Act.

The next question is whether sub-section (b) refers only to a legal proceeding or remedy, in respect of such right etc., that was started before the commencement of the Act. The words are general and would ordinarily include any suit or application for execution or any enforcement of a legal remedy in respect of a right, title, etc., already acquired, accrued or incurred. The difficulty is caused by the use of the expression "before the commencement of the Act" at the end of sub-section (b). Now I quite agree that these words, if they were confined to "anything done or suffered", would *prima facie* make sub-section (c) altogether redundant, because the last words of sub-section (b) are repeated therein. But if it be also understood that the noun "anything" is governed by the prepositional clause "in respect of", then the section would read as follows: "any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability, or in respect of anything done or suffered before the commencement of the Act." On such a view, sub-section (c) would not at all be redundant, for that sub-section would apply to the thing done or suffered before the commencement of the Act, whereas sub-section (b) would apply to any legal proceeding or remedy in respect of such thing. There is great difficulty in my mind in interpreting sub-section (b) as if the words "before the commencement of the Act" were an adjectival clause qualifying the nouns "legal proceeding or

remedy" and not an adverbial clause indicating a point of time modifying the words "done or suffered". If the former had been the intention, then the words should have been "any legal proceeding or remedy *taken* before the commencement of this Act", for the words "done or suffered" are inappropriate for being used in connection with "proceeding or remedy". On the other hand, as a mere adverbial clause, they can very well modify the words "done or suffered", without any difficulty from the point of view of grammar or meaning. The section would then mean that nothing in the Act, including the provisions of section 6g, can affect any right, title, interest or liability, already acquired, accrued or incurred before the commencement of the Act, or can affect any legal proceeding or remedy in respect of any right, title, etc. acquired before the commencement of the Act. It will then follow that a suit which is brought to enforce a right which had already accrued would not be governed by the provisions of section 6g of the Act.

The additional difficulty to be faced is that the provisions of the section are somewhat analogous to the provisions of section 6 of the General Clauses Act. In section 6(c) the words "affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed" are mentioned, and then in subsection (e) it is provided that the repeal shall not "affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid". Indeed section 6(e) goes still farther and lays down that "any such investigation, legal proceeding or remedy may be instituted, continued or enforced . . . as if the repealing Act or Regulation had not been passed". Section 6 therefore indicates that any institution, continuance or enforcement of any legal proceeding in respect of any right so previously acquired is not barred.

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There are a large number of cases in which it has been held that suits filed after the coming into force of the Civil Procedure Code or the Limitation Act are generally governed by the later Acts and not by the earlier Acts under which the right might have accrued; but those decisions, I understand, proceeded mainly on the interpretation of the provisions of the Civil Procedure Code and the Limitation Act themselves and not on the application of section 6(e). It seems that section 6(e) would apply to those cases only where a previous law has been simply repealed and there is no fresh legislation to take its place. Where an old law has been merely repealed, then the repeal would not affect any previous right acquired nor would it even affect a suit instituted subsequently in respect of a right previously so acquired. But where there is a new law which not only repeals the old law, but is substituted in place of the old law, section 6(e) of the General Clauses Act is not applicable, and we would have to fall back on the provisions of the new Act itself.

I would therefore have great reluctance in holding that section 74 of the Partnership Act should be given a restrictive meaning and that although it specifically provides that any legal proceeding in respect of a right, title, etc., acquired, accrued or incurred before the commencement of this Act should not be affected by anything in this Act, section 69 still governs such suits.

I have, however, a feeling that although the words chosen were altogether unhappy, the real intention might probably have been what my learned brother infers. The case of *Surendra Nath De v. Manohar De* (1) certainly supports his view, for the learned Judges in that case laid down that where a suit is instituted after the commencement of the Partnership Act, though the cause of action accrued before the commencement of the Act, it was not saved by section 74(b), and that that section applies only to pending proceedings, that is to

(1) (1934) I.L.R., 62 Cal., 213.



say, proceedings which were pending at the time when the Act came into force. This interpretation would unfortunately involve the introduction of words like "pending" in sub-section (b) of the Act. The case of *Ram Prasad Thakur Prasad v. Kamta Prasad Sita Ram* (1) is also directly in favour of the same view. As the case comes up before us in revision, I am not bound to interfere. Accordingly I think that on the whole I should concur in the order proposed by my learned brother that the revision be dismissed.

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### APPELLATE CIVIL

*Before Mr. Justice Allsop and Mr. Justice Bajpai*

GOVIND RAM AND OTHERS (DEFENDANTS) v. KASHI NATH  
(PLAINTIFF) AND PHULCHAND ROSHANLAL AND OTHERS  
(DEFENDANTS)\*

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*Composition Deed—Arrangement—Nature and essentials—Debtor conveying bulk of his property to trustees for the benefit of his creditors—Debtor thereby divested of his interest in the property—Not attachable subsequently by a decree-holder—Whether knowledge and consent of all the creditors is essential—Whether reservation of a small portion of the property for the debtor invalidates the transaction—Registration whether necessary—Registration Act (XVI of 1908), section 17(2)(i)—Trusts Act (II of 1882), section 5—Interpretation of statutes—General law and special law.*

An arrangement was effected as a result of meetings between the representative of a firm, which was in difficulties on account of heavy liabilities, and some of the creditors and a composition was decided upon. The creditors present nominated seven persons from among themselves as trustees and a deed was executed by which the proprietors of the debtor firm assigned the bulk of their property, movable and immovable, to the trustees for the benefit of the creditors, giving them full powers to realise all the property and apply the proceeds towards the composition and payment of the debts. The deed was signed by the debtor and the seven trustees, and later on by some other

\*First Appeal No. 107 of 1932, from a decree of Ram Saran Das Raizada, Subordinate Judge of Aligarh, dated the 12th of February, 1932.

(1) A.I.R., 1935 All., 898.



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creditors in token of their assent. The trustees and the other assenting creditors held claims against the debtor to the extent of Rs.8½ lakhs out of a total indebtedness of Rs.10 lakhs. A small portion of the debtor's property, of the value of about Rs.10,000, was allowed to be reserved by the debtor, and this fact was mentioned in the deed. The deed also mentioned that any other property which might be discovered to belong to the debtor would also be assigned and delivered to the trustees, but no such property was discovered. It appeared that notice had not been given to, or a meeting held of, all the creditors; nor were regular proceedings of the meetings drawn up or the accounts overhauled at the meetings. An examination of the circumstances in which the deed was executed showed that it was a fair and *bona fide* transaction, that there was no concealment or fraud and that no undue preference had been given to the trustees or any other creditor. The deed was not registered. One of the creditors who had not assented to the composition deed subsequently sued on his debt and in execution of his decree sought to attach and sell property which had been assigned by the composition deed, the validity of which he assailed on various grounds. *Held—*

Arrangements by which a debtor makes a *bona fide* assignment of his entire property to trustees for the benefit of his creditors have the effect of divesting the debtor of all interest in the property so assigned, so that it can not be the subject of attachment issued subsequently at the instance of a creditor who has obtained a decree upon his debt.

Even if such a deed of composition does not comprise the whole of the property of the debtor it is not void if the transaction is fair and *bona fide*. The mere fact that the creditors allowed the debtors to reserve a small portion of their property, which is mentioned in the deed, for their own purposes would not invalidate the transaction. The test is whether there has been any concealment or fraud by the debtors. Any property so reserved does not vest in the trustees and a subsequent execution creditor is free to proceed against it in execution.

If the transaction is a fair and *bona fide* transaction, the composition deed is not void by reason of the fact that it is not signed by all the creditors. The giving of a notice to, or the holding of a meeting of, all the creditors is not essential, nor is it necessary that regular proceedings of the meeting should be drawn up or the accounts overhauled, before a composition deed can be said to be *bona fide*. All that is wanted is that

there should be no fraud contemplated by the debtor and that the trustees should not be participants in any such fraud.

Such a deed of composition is not void by reason of its containing a clause empowering the trustees to employ the grantor or any other person in winding up the affairs of the grantor and in collecting and getting in his estate and effects which have been assigned and in carrying on his trade or business if thought expedient by the trustees.

A composition deed can not be invalidated by any subsequent negligence on the part of the trustees in performing their duty.

So far as the Registration Act itself is concerned, a composition deed assigning the debtor's property to trustees for the benefit of creditors does not, by reason of the exemption contained in section 17(2)(i) of the Act, require registration; but this does not mean that if the document requires registration under any other enactment the exemption contained in section 17(2) would prevail against that other enactment. The exemption from registration is available to a composition deed only to the extent that it purports to create or assign a right in immovable property and not when it amounts to a trust, which obviously contemplates something more than the mere creation or assignment of a right in immovable property, and which requires registration under section 5 of the Trusts Act. It is true that in a composition deed the essence is undoubtedly the compounding of debts, but where it lays down the machinery of a trust, the trust is an integral part of it and can not be said to be merely accidental or incidental. So far, therefore, as the composition deed is a trust deed it is not valid, for want of registration.

There is, no doubt, a presumption that a subsequent general enactment will not override the provisions of an earlier special enactment, unless such an intention is clearly manifested; but this principle is not applicable to the case. The Registration Act and the Trusts Act may both be said to be enactments dealing with special subjects, and both of them equally might be said to deal with general subjects. Further, as already pointed out, there is really no conflict between the two Acts so far as the question of registration is concerned.

Mr. B. E. O'Connor, Sir Tej Bahadur Sapru, Dr. K. N. Katju, Messrs. S. K. Dar and Gopi Nath Kunzru, for the appellants.

Dr. S. N. Sen, Mr. A. Sanyal, Miss S. K. Nehru, Messrs. Misri Lal and A. M. Gupta, for the respondents.

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ALLSOP and BAJPAI, JJ.:—This is an appeal by the defendants. The plaintiff Seth Kashi Nath, who was said to be of weak intellect, brought a suit with his mother Mst. Asharfi Kunwar as next friend for a declaration that the property mentioned at the foot of the plaint was owned by the defendants second party and was liable to be attached and sold in satisfaction of the plaintiff's decree passed in suit No. 42 of 1930 of the court of the Subordinate Judge of Aligarh (Seth Kashi Nath v. Roshan Lal and others). He impleaded as defendants to the suit Govind Ram and six others who were described as defendants first party and the firm of Phool Chand Roshan Lal situate at Hathras with its various partners who were described as defendants second party. The allegations contained in the plaint were that the firm of Phool Chand Roshan Lal was about to become bankrupt in the month of April, 1929, and that the partners thereof with a dishonest intention approached the plaintiff's guardian who was a parda-nashin lady and borrowed a sum of one lakh of rupees. The firm subsequently on the 25th of May, 1929, executed a collusive document by way of a composition deed in favour of the defendants first party as trustees, although as a matter of fact no property was transferred to the trustees nor were the movables, belongings, ornaments, and cash entrusted to them. The plaintiff obtained a decree on the basis of the loan mentioned above in suit No. 42 of 1930 from the court of the Subordinate Judge of Aligarh on the 22nd of August, 1930, but when the decree was put into execution an objection was filed by the trustees and this was allowed on the 28th of February, 1931. It is now said that the composition deed did not have the effect of vesting the property mentioned in the plaint in the trustees and that the plaintiff was entitled to get it attached and sold in execution of his decree.

The two sets of defendants filed separate written statements and pleaded that the composition deed,

dated the 25th of May, 1929, was executed in good faith and for the benefit of all the creditors, that the movable and immovable property of the defendants second party was made over to the trustees for the benefit of all the creditors and that after the execution of the document the trustees entered into possession and paid a dividend of five annas out of sixteen to the creditors. The contention of the defendants was that the trustees had got an absolute right over the property of the debtors by virtue of the composition deed and that the property was not liable to be attached and sold in execution of the plaintiff's decree. A point was made by the plaintiff that, the document not being registered, the trustees had not acquired any right in the property in dispute, while it was pleaded in defence that there was no necessity for the composition deed to be registered.

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The learned Subordinate Judge framed three issues which were:

(1) Whether the composition deed, dated the 25th of May, 1929, was fictitious and was executed fraudulently to defeat the creditors or it was executed honestly and for the benefit of all the creditors.

(2) Is the plaintiff also bound by the terms of the composition deed in dispute? If so, is he entitled to obtain the declaration claimed?

(3) Is the plaintiff entitled to the relief sought?

It would thus appear that no issue was struck on the question whether the composition deed required registration or not and no finding was given by the learned Subordinate Judge on the point. He came to the conclusion that the deed was executed in collusion with the trustees and that it was a colourable transaction. As regards "the legal position of the composition deed" he was of the opinion that the authorities cited by the defendants, being "of a time when there was no insolvency codified law", were not applicable to the facts of the case, and that "the defendants could have

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proceeded either by way of a contract, if they had obtained the signatures of the plaintiff also on the composition deed, or could have proceeded under the insolvency law in force in these provinces", but that they had taken neither of those courses. He further observed that as the document effected "a sort of adjustment between the plaintiff decree-holder and the defendants second party the latter could have proceeded under the Code of Civil Procedure under order XXIII." He wound up by saying: "To my mind, the entire proceedings of the defendants second party appear to be mere dishonest ones and most injurious to the plaintiff, one of the two big creditors of theirs, and the composition deed appears to be a collusive one only." He, therefore, decreed the plaintiff's suit with costs and gave a declaration "that the property in dispute was liable to be auctioned and attached in execution of the decree No. 42 of 1930 as the property of the defendants second party."

We might mention at the very outset that the case was not properly handled in the court below by the parties and that the learned Subordinate Judge himself did not examine the case from all points of view and has done very scant justice to the complicated questions of law and fact that arose in the case.

The contention of the appellants is that the composition deed, dated the 25th of May, 1929, was executed honestly for the benefit of all the creditors, that the finding of the learned Subordinate Judge to the contrary was wrong and that the property was not liable to attachment and sale at the instance of the plaintiff in execution of his decree against the defendants second party. Upon the judgment of the court below the very first question that we have got to decide is whether the composition deed was a paper transaction or whether it had the effect of vesting the property of the debtor firm in the trustees. No plea connected with the Registration Act was taken in the grounds of appeal,

but in the course of arguments that point assumed importance and we shall have to discuss it at length at a later stage.

It was not said that it was not open to a debtor to arrive at a composition with his creditors, but it was contended strenuously on behalf of the respondents that a composition deed properly so called was an offspring of contract and did not contemplate the intervention of trustees. In support of this contention our attention was drawn to the definition of a "composition" given in Wharton's Law Lexicon, 13th edition, at page 197 as "an agreement made between an insolvent debtor and his creditors, by which the latter accept a part of their debts in satisfaction of the whole", but the learned writer after giving this definition makes a reference to "arrangements" which are described at page 69 and the discussion contained there under the heading of "Arrangements between debtors and creditors" refers to the various enactments in England, specially the Deeds of Arrangement Act, 1914, and there cannot be the slightest doubt that the machinery of trust is recognized there. In Bouvier's Law Dictionary a "composition" is defined as "an agreement, made upon a sufficient consideration, between a debtor and creditor, by which the creditor accepts part of the debt due to him in satisfaction of the whole", but this does not show that if the agreement provides for the intervention of the trustees it will not be a composition. In the same book "a deed of arrangement" is defined as "a term used in England to express an assignment for the benefit of creditors" and in England, as we have said before, the Deeds of Arrangement Act provides for the creation of trusts. The expression "composition deed" has not been defined or described in any Indian statute except in article 22 of the first schedule to the Indian Stamp Act, Act II of 1899, where in the term "composition deed" are included instruments executed by a debtor (1) whereby

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he conveys his property for the benefit of his creditors, (2) whereby payment of a composition or dividend on their debts is secured to the creditors, and (3) whereby provision is made for the continuance of the debtor's business under the supervision of inspectors, or under letters of license, for the benefit of his creditors. We shall presently show that arrangements by which a debtor *bona fide* assigns his entire property to trustees for the benefit of his creditors are well known in England as well as in India and have the effect of divesting the debtor of any interest in the property so assigned, so that the property cannot be the subject of attachment issued subsequently at the instance of a creditor who has obtained a decree upon his debt. Lewin on Trusts, 13th edition, page 542, says, "indeed it has now been decided that if property be assigned to a trustee and he takes possession of it and communicates with certain of the creditors, who express satisfaction, the trust is irrevocable". May on Fraudulent and Voluntary Dispositions, 3rd edition, page 379, says: "The general rule is that a complete transfer of property by a voluntary donor, which is effectually vested in trustees for his donee, is irrevocable" and that a legal assignment is made. According to this learned author communication to the creditors in the case of trusts for the benefit of creditors seems to be necessary which is not necessary in the case of a trust for the benefit of a mere donee, but at page 78 he says: "The intentional exclusion of a creditor or creditors or of a certain class of creditors from the benefits of an assignment in trust for creditors does not render the assignment void." Underhill in his Law of Trusts and Trustees, 7th edition, page 36, observes: "*Prima facie* a trust deed for the payment of the settlor's creditors *generally*, is deemed to have been made for the debtor's convenience . . . But on the other hand, where the creditors are parties to the arrangement, the inference then is that the deed was intended to create a trust *in their* favour which they are entitled to

call on the trustees to execute." The cases of *Siggers v. Evans* (1), *Harland v. Binks* (2) and *Synnot v. Simpson* (3) lend support to the views of the learned writers mentioned above. In the present case the composition deed is described as an indenture between the debtors of the first part, the trustees of the second part and the creditors of the third part. It was signed on the 25th of May, 1929, by the debtors and the trustees who, it may be mentioned, were some of the creditors of the debtor firm, and it was on subsequent dates signed by many other creditors. The debtor firm was indebted at the time when the composition deed was executed to the extent of about ten lakhs, the trustees who signed the document on the 25th of May, 1929 were creditors to the extent of over three lakhs, and on subsequent dates 36 creditors from Bombay and 7 from other places signed the deed in token of their assent. The debtors were indebted to 69 creditors in Bombay and 150 creditors in other places. The assenting creditors held claims against the debtors to the extent of about eight lakhs and fifty thousand rupees and the creditors who have not signed the document represent debts aggregating about a lakh and forty thousand rupees; of such creditors the principal person is the plaintiff whose debt amounts to a lakh of rupees. It would thus appear that the majority of the creditors have given their assent to the document and the trustees who have shouldered the responsibility of administering the trust represent about one-third of the general indebtedness of the firm of Phool Chand Roshan Lal. Although some of the creditors may not have expressed their willingness to accept the arrangement made by the debtors, yet, as was decided in the case of *Siggers v. Evans* (1), at page 380, a creditor who does not assent to the assignment can sue the debtor, but cannot proceed against the property which under the deed has vested in the trustees. The document can

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(1) (1855) 5 E. & B., 367. (2) (1850) 15 Q.B.D., 713.  
(3) (1854) 5 H.L.C., 121.



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not be deemed to have been made only for the debtors' convenience nor can the trustees be treated as mere mandatories. They have a right to claim directly under the deed as parties taking a legal and equitable interest which cannot be defeated at the instance of a subsequent execution creditor. LORD CAMPBELL, C.J., in the case of *Siggers v. Evans* (1), after mentioning the terms of the document under inquiry there and the circumstances from which the assent of some of the creditors could be inferred, observed: "We think that we cannot hold that this deed, which is made to a creditor as trustee for himself and others, could be revoked by the assignor after it was communicated to the assignee, or that it was a void deed within the rule referred to."

The cases decided by the Indian High Courts also favour such compositions. The earliest case perhaps is the case of *Bomanjee Manockjee v. Nowrojee Pallonjee* (2) decided in 1864. It was held there that a *bona fide* assignment by a debtor of his entire property to trustees for the benefit of his creditors divests him of any interest which can be the subject of attachment subsequently issued in execution of a decree against such debtor until the trusts of the deed of assignment have been carried out. In this case the debtor had assigned all his goods, property and outstandings to five persons in trust to divide the proceeds amongst his creditors, by a document dated the 23rd of September, 1862. In accordance with the agreement the debtor handed over his property to the trustees, who took possession and caused it to be sold by public auction. 58 out of 65 creditors had signed the trust deed but one had not done so and he filed a plaint in 1863 to recover the amount of his debt and obtained an *ex parte* judgment for the amount, after which he issued execution and attached in the hands of the auctioneer a portion of the proceeds of the trust property. On a suit by the debtor and the trustees the defendant execution creditor was

(1) (1855) 5 E. & B., 367(380).

(2) (1864) 1 Bom. H.C.R., 233.

restrained from receiving and the auctioneers from paying the amount of the attaching creditors' debt out of the trust property.

In the case of *Trustees of Palmer's estate v. Colonel Bomgartner* (1) it was held that an insolvent debtor in the mofussil may assign all his property to trustees for the benefit of creditors who may assent to the conditions of the assignment; and such an assignment will be valid although it may operate to defeat an expected execution, if the intention of the assignor was to confer on the assenting creditors a substantial interest in the property assigned and not merely to defeat or hinder a judgment creditor. Such an assignment will confer on the trustees a title to the property assigned superior to that of a judgment creditor who has obtained an order for attachment subsequently to the assignment. In this case also some of the creditors did not give their assent to the arrangement made by the debtor, and this judgment of a learned single Judge was affirmed in appeal and the appellate judgment is to be found at page 321 of the same volume.

In *Bapuji Auditram v. Umedbhai Hathesing* (2) it was held that "The assignment in a trust-deed, by which a person assigns all his property to trustees for the benefit of his creditors, protects the assets so assigned from all creditors." The learned Judge observed: "Such assignments to trustees are, as remarked by SAUSSE, C.J., in *Bomanji v. Naoroji* (3), highly favoured by Courts of Equity, and in that case, as in the present, a creditor who had not signed the trust deed was, nevertheless, held bound by it."

In the case of *Malukchand v. Manilal* (4) a composition deed was executed on the 14th of December, 1900, by which certain persons were appointed trustees. It was signed by the debtor and some of his creditors and the debtor made over to the trustees his immovable

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(1) (1868) 3 N.W.P. H.C.R., 104.

(2) (1871) 8 Bom. H.C.R., 245(249).

(3) (1864) 1 Bom. H.C.R., 233.

(4) (1904) I.L.R., 28 Bom., 364.

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property, account books and goods. CHANDAVARKAR and BATTY, JJ., held that the deed, which was described as a composition deed in the document itself and which was so treated by the court below and which was for the benefit of the creditors but which did not comprise the whole of the property of the judgment-debtor, was not void if the transaction was fair and *bona fide* and in the ordinary course of business or upon the pressure of the creditors and that it did not become void by the circumstance that it was signed by some only of the creditors.

This very deed came up for consideration in 1909 before the Bombay High Court in a subsequent case, *Fida Alli Mahamad Alli v. Chandrashankar Pranshankar* (1) (unreported Second Appeals Nos. 332 and 347 of 1907, decided on the 1st of December, 1909) a report of which appears at the bottom of page 584 in the case of *Chandrashankar v. Bai Magan* (2), and it was held to be a composition deed binding on a subsequent execution creditor who was held to have no rights which he could enforce under an attachment. The same deed was again before the Judges of the same High Court in *Shekh Adam Hasanali v. Chandrashankar* (3). It does not appear that any translation of the document was supplied to the court and then their Lordships said: "There is nothing whatever in the language of the deed to show that there was any composition, any settlement with the creditors that the debtor should pay less than he owed to them and that they agreed to accept that composition. The essential test of a composition deed is that there ought to be a compounding of debts due. Of that there is no trace whatever so far as the language of this document is concerned." On this reasoning the document was held not to be a composition deed. The Court's opinion, however, appears to have been based upon the case of *The Queen v. Cooban* (4), where

(1) (1909) I.L.R., 38 Bom., 584. (2) (1914) I.L.R., 38 Bom., 576.  
foot-note.

(3) (1912) 14 Bom., L.R., 506(507). (4) (1886) 18 Q.B.D., 269.

the question was whether a *cessio bonorum* for the benefit of creditors by a document which incorporated a release by the creditors was a composition deed.

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Curiously enough the same deed was again interpreted in the Bombay High Court by SCOTT, C.J., and BATCHELOR, J., in the case of *Chandrashankar v. Bai Magan* (1), where the terms of the deed are given at length. It appears that the debtor executed a deed making over all specified assets to certain nominated trustees with the consent of creditors to the extent of Rs.1,22,000 out of the total number of creditors claiming Rs.1,60,800 and the document was held to be a composition deed and to have the effect of vesting the property in the trustees.

In the case of *Subbaraya v. Vythilinga* (2) the facts were that a certain debtor was adjudicated bankrupt in Mauritius and a receiver was appointed by the court but subsequently the creditors met and resolved that, if the adjudication was annulled, a composition payable by instalments be accepted and that the security of a certain firm be accepted for payment of such composition and that the bankrupt's estate be assigned to that firm. An instrument was then executed to give effect to these resolutions and was concurred in by the receiver and approved by the court which annulled the adjudication and ordered that the bankrupt's estate in Mauritius and India vest in the firm which had stood security and which was appointed trustee to carry out the said composition with full power of realisation. The learned Judges held that the above instrument was valid as a composition deed.

The case of *Manindra Chandra Nandy v. Lal Mohan Ray* (3) may also be mentioned in this connection. The judgment in the report is a judgment of the Letters Patent Bench and is on a different point altogether, but the facts are stated at length and it would appear from

(1) (1914) I.L.R., 38 Bom., 576. (2) (1892) I.L.R., 16 Mad., 85.  
(3) (1929) I.L.R., 56 Cal., 940.

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those facts that a single Judge had a somewhat similar document before him which he interpreted as a composition deed and which he held to be valid and it was made to prevail against the claim of a subsequent mortgagee. The composition deed or the deed of trust was executed on the 1st of April, 1921, and it was contended by a subsequent mortgagee that the conveyance was fraudulent inasmuch as it was executed for the benefit of some of the creditors only who had executed the agreement whereas other creditors had not executed the conveyance or assented to it. This contention was repelled.

We have left for the last the decision of their Lordships of the Privy Council in the case of *Bank of Upper India, Ltd. v. Kaniz Abid* (1). Here their Lordships were construing a certain document executed by one Chaudhri Sharf-uz-zaman on the 30th of January, 1912, by which he appointed certain persons as trustees of the whole of his estate. The document declared that the said trustees should from the date of the indenture enter upon and take possession of all the estate and properties mentioned in schedule A, pay Government revenue and public charges, and after payment of Government revenue and public charges and certain other necessary expenses apply the balance to the payment of certain monthly allowances to Sharf-uz-zaman and members of his family, and after that apply the surplus towards the liquidation of the debts and liabilities chargeable upon the estate as specified in schedule B and others not so charged as specified in schedule C, in the manner and in the order the trustees might consider proper and beneficial to the estate. Their Lordships observed that when once a deed of trust was executed and property conveyed to the trustees for the benefit of the creditors of the author of the trust and for other purposes recited in the deed, the author of the trust ceased to have any interest in the property covered by the deed of trust.

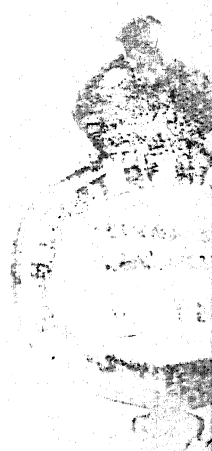
(1) [1935] A.L.J., 785.

This case has been referred to at this stage of the judgment only for the purpose of showing that the author of the trust after the execution of a deed of trust ceases to have any interest in the property covered by the deed of trust and that, therefore, nothing is available against which a subsequent execution creditor can proceed. There was no question of a composition deed before their Lordships of the Privy Council and to that extent this case might be said to be distinguishable.

Applying the principles laid down in the above cases and text-books, we now proceed to consider the terms of the deed before us in order to arrive at a conclusion whether it was a fair and *bona fide* transaction in the ordinary course of business and thus not open to objection, or whether it was fraudulent and intended to give an undue preference to certain creditors over others, or whether it was only a paper transaction. For this purpose the evidence of Bansidhar, the munim of the debtor firm who gives the complete history of the document, is of great importance. It appears that the firm sustained heavy losses in 1929 and in the beginning of May the situation of the firm became very critical as the settlement of seed and cotton *saudas* was approaching and there were no funds available to meet the situation. The liabilities of the Bombay firm alone came to over seven lakhs and the entire indebtedness of the firm with its branches in other parts of India came to about ten lakhs. There were three proprietors of the firm, namely Roshan Lal, Sagar Mal and Hoti Lal. Of these Roshan Lal alone was in Bombay and the situation was explained to him by the witness and it was represented that unless funds to the extent of two to three lakhs could be arranged it was not possible to tide over the difficulty. Lala Roshan Lal said that it was not possible to make any arrangement in Bombay and it was suggested that he and the witness should go to Hathras. Roshan Lal and Bansidhar therefore left for Hathras on the 2nd of May and at that place there was a con-

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ference of the three proprietors and it was decided that Bansidhar should proceed to Bombay and approach all the creditors and persuade them to agree to a composition. The proprietors handed over to Bansidhar all their jewellery packed in two boxes and gave a list of all their immovable and movable property. Bansidhar arrived in Bombay on the 14th of May and on the 15th or the 16th of May there was a settlement with the members of the East India Cotton Association in this way that the two boxes of jewellery were pledged for a sum of Rs.20,000 with one Chunni Lal Onkar Mal and the debts of the creditors whose claims arose out of transactions in cotton made subject to the rules of the East India Cotton Association and the debts of the creditors whose claims arose out of transactions in wheat and linseed made subject to the rules of the Marwari Chamber of Commerce, Ltd., were satisfied to the extent of five annas in the rupee and for the balance of eleven annas in the rupee hundis were passed. One informal meeting of creditors was then held on the 16th or the 17th or the 18th of May and another on the 20th of May, 1929, when Bansidhar entreated the creditors to accept a composition. He stated that the debtors were prepared to place all their property, movable and immovable, and outstandings to the extent of eight to ten lakhs at the disposal of the creditors, and, if the offer was refused, the creditors would get nothing and the firm would have to go to insolvency. The creditors after consultation amongst themselves selected seven persons who were given authority to do whatever they thought proper in the matter. The seven persons so selected were: (1) Govindram, of the firm Tarachand Ghunshamdas, (2) Ramkumar Murarka, (3) Soorajmal, munim of Champalal Ramswaroop, (4) Indarmal, munim of Joharimal Ramlal, (5) Babu Lal, partner of Ramjimal Babulal, (6) Jagannath, of the firm of Gopiram Radhakison and (7) Kakubhai, of the firm of Khimji Vishram. It was decided that the work of drafting a composition



deed should be entrusted to Messrs. Malvi Modi and Ranchoddas, a firm of solicitors. The deed was then drawn up on a stamp paper and it was signed by Bansidhar as the agent of the debtor firm under a power of attorney executed by the partners on the 12th of May, 1929, and by the trustees mentioned above on the 25th of May, 1929. It was provided in the deed that the trustees should stand possessed of the trust estate which was conveyed, assigned and transferred to them upon trust. They had full power to sell properties and to pay the creditors and were given extensive powers for the composition and payment of debts. The debtors covenanted that they would at the request of the trustees assign and deliver all other premises and properties which might be discovered to belong to them or any of them which were not hereby conveyed. The claims arising under the transactions made subject to the rules of the East India Cotton Association and the Marwari Chamber of Commerce were exempted and the creditors in respect of those claims were declared not to be entitled to receive any dividend or benefit from the trustees. On the face of it the document appears to be a fair and *bona fide* transaction; the debtors placed all their properties in the hands of the trustees, giving them power to realise the outstandings and to convert the immovable property and shares into cash and pay the creditors. The document was drawn up by Mr. Damodar Das, a member of the firm of solicitors selected by the trustees. He drew up the document on the basis of instructions given to him by the trustees, such instructions being contained in certain notes taken down by the trustees at the meeting of the creditors. The firm of solicitors is a respectable firm paying an income-tax of over Rs.6,000 a year. The composition deed was drawn up in duplicate and after the 25th of May, 36 more creditors signed the document of which seven were creditors from outside Bombay. As mentioned in an earlier part of this judgment the trustees represent creditors to the extent of

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over three lakhs and in conjunction with the other signatories the assenting creditors represent as much as about eight and a half lakhs out of a total indebtedness of about ten lakhs. Three other witnesses, namely Suraj Mal, Govind Ram and Hansraj were also examined. They are trustees, nominated in the composition deed. Govind Ram is the manager of the Board of trustees and Suraj Mal was the President of the meeting of creditors which was held on the 20th of May, 1929.

It is contended on behalf of the plaintiff respondent that the meetings of creditors never took place. It is urged that no witness except Bansidhar speaks of two meetings and that as regards the meeting of the 20th of May, 1929, no list of the persons who attended the meeting was kept and no notes of the discussion that was had are available (the evidence that the notes were destroyed after the drawing up of the composition deed is attacked as false). It is, however, impossible to believe that there was no meeting whatsoever of the creditors and that the composition deed was executed in a secret manner. We know that seven trustees had actually signed the document on the 25th of May, that others signed it subsequently and that in the state of the market at Bombay when claims were pouring in, the execution of a document of this nature in the office of an established firm of solicitors at Bombay could not be effected in a clandestine manner. We, therefore, feel inclined to believe, in spite of the fact that the list of the creditors who attended the meeting and the notes of the proceedings are not available, that there was a meeting of some of the important Bombay creditors and that the composition deed was the result of an agreement between the debtors as represented by Bansidhar and the trustees and certain other creditors. It is admitted that no notice was printed and that the creditors were informed only by word of mouth, but that does not in any way prove that there was no meeting of the creditors nor

does the absence of any *regular* meeting of the creditors or of any notice invalidate the deed, for all that is wanted is that there should be no fraud contemplated by the debtor and that the trustees should not be participants in any such fraud.

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In support of the respondents' contention it is said that it is incredible that if there was a meeting of the creditors they should have accepted the statement of Bansidhar alone as regards the assets of the debtor; but it was well known in Bombay that the munim had been in the employment of the firm for twenty-two years and was managing the affairs of the firm and was fully cognisant of the entire position. After all it is not necessary in view of the cases which we have mentioned above that all the creditors should assent to the composition. It was conceded by Dr. Sen on behalf of the respondents that as a pure question of law it could not be argued that the giving of a notice or the holding of a meeting of all the creditors was essential nor that it was necessary that regular proceedings should be drawn up and accounts overhauled before a composition deed could be said to be *bona fide*. All that he said was that the absence of these facts might lead the court to conclude bad faith. In the absence of any evidence contradicting them we are not in a position to hold that the statements of three of the trustees, of the solicitor, and of Bansidhar regarding the circumstances under which the deed was drawn up should be rejected. It was then said that some portion of the property was reserved by the debtors. This property is mentioned in schedule 3 of the composition deed. It consists, of certain mortgagee rights and according to Hansraj its value is Rs.9,000 or Rs.10,000. The same witness stated that he went to Hathras in order to make inquiries regarding the position of the debtors and he believed that all the brothers had given their jewellery to the trustees except Hoti Lal. The matter, however, was not pursued further and we

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do not know whether this belief of Hansraj was well founded or whether Hoti Lal had any jewellery worth the name. The mere fact that the creditors allowed the debtors to reserve a small portion of their property for their own purposes would not invalidate the transaction, for after all the debtors also have to live. In the case of *Trustees of Palmer's estate v. Colonel Bomgartner* (1), referred to above, it was held that the fact that the composition deed empowered the trustees to permit the debtor to retain such portion of his furniture, linen, etc. as they might think fit would not render the deed invalid, but that the power should be exercised only when the other assets were sufficient to discharge the primary object of the trust. In the case of *Malukchand v. Manilal* (2) the property covered by the deed did not exhaust the whole of the debtor's assets but was only a part thereof, the rest being left with the debtor for his benefit. Lewin on Trusts, 10th edition, page 583, says: "If a person assigned *part* only of his property in trust for creditors, then if the transaction was *fair* and *bona fide*, in the ordinary course of business or upon the pressure of the creditors, it was not open to objection; but if the settlor contemplated bankruptcy or even thought it probable though not inevitable and wished to give an undue preference to certain creditors over others, it was *fraudulent* and constituted an act of bankruptcy." The real test is whether there has been concealment by the debtor or whether he has, to use a common expression, placed his entire cards on the table. The property reserved is mentioned in the deed itself and so far as the plaintiff is concerned he is in no way prejudiced, for the trustees have no right in that property and it may be open to the plaintiff to proceed against the reserved property, for the debtors have not divested themselves of their rights in that property. On this ground alone, therefore, it is not possible to hold that the transaction was in bad faith.

(1) (1868) 3 N.W.P. H.C.R., 104. (2) (1904) I.L.R., 28 Bom., 364.

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It is then said that the trustees did not function after execution of the deed and that the business of the firm was conducted on the old lines under the supervision of the old servants. So far as the evidence in this case goes, Govind Ram who is the President of the Board of Trustees says that 50 or 60 meetings of the trustees must have been held since the creation of the trust. It is true that no proceedings book kept by the trustees has been produced, although according to the statement of Suraj Mal a minute book of the proceedings of the meetings of the trustees was kept. The answer to this is that this was never demanded from the trustees, and we see no reason to disbelieve the statements of Suraj Mal and Govind Ram on this point. The *bahi khata*s of the firm Phul Chand Roshan Lal are now kept by the trustees and Govind Ram signs them monthly. It is true that the trustees have kept some of the old servants but that was only natural inasmuch as such old servants were expected to know the business of the firm and would naturally be of great assistance in realising the outstandings. In the case of *Janes v. Whitbread* (1) it was held that an assignment of all the trader's effects, *bona fide* executed, to a trustee for the general benefit of all his creditors is not void, although it contains a clause empowering the trustee to employ the grantor or any other person or persons in winding up the affairs of the grantor and in collecting and getting in his estate and the effects thereby assigned and in carrying on his trade if thought expedient by him. Further, under clause (7) of the composition deed the trustees were empowered to engage the *munims* and *gumashtas* of the debtors for the purpose of realising the outstandings.

After the execution of the composition deed the trustees sent Jagannath to Hathras to make inquiries into the affairs of the partners of the firm. It would have been better if Jagannath had been produced, but another trustee, namely Hansraj Jiwandas, who also went

(1) (1851) 11 C.B.R., 406.

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to Hathras to make inquiries has been produced. The statement of Bansidhar that the partners had no cash and had no jewellery beyond what was handed over to Bansidhar was undoubtedly accepted on trust, but the books of the firm were given to the trustees and they had ample opportunity to find out from the books regularly kept in the course of business if the statement of the munim Bansidhar was correct or not. Further, under clause (12) of the composition deed the debtors covenanted to assign to the trustees all other premises and properties which might be discovered to belong to them.

A criticism was advanced on behalf of the plaintiff that the trustees did not, either before or after the deed dated the 25th of May, 1929, prepare a list of the money due to the firm from others, but no question on this point was put to the trustees, and after all this failure can amount only to negligence on their part and a deed cannot be invalidated by subsequent negligence on the part of the trustees. This was held in the case of *Trustees of Palmer's estate v. Colonel Bomgartner* (1). On this part of the case it might be mentioned that the trustees took possession of the books of the firm, sold the immovable property at Cawnpore, Chandausi and Ganjdundwara and the shares belonging to the partners, and prepared a list of the creditors. The amount of their debts is calculated up to the 7th of June, 1929, and dividends at the rate of five annas in the rupee were distributed to the various creditors in two instalments. Some of the non-assenting creditors returned the cheques but the majority of the creditors accepted the dividends sent by the trustees. According to the evidence of Bansidhar, on the 26th of May, 1929, a notice was sent to the plaintiff by the trustees through the solicitors informing him about the composition deed and requesting him to submit his account and the plaintiff did submit a statement of his account. This shows that the plaintiff at first accepted the authority

(1) (1868) 3 N.W.P. H.C.R. 104.

of the trustees but later resiled from this position. The books of the debtor firm are now in the possession of the trustees and came to court from their custody. The trustees went to Hathras and obtained rent agreements from certain tenants occupying houses belonging to the debtors. There were eleven such rent agreements. In some cases the debtors themselves, who were occupying some of the houses, executed rent agreements in favour of the trustees and from the accounts we find that such rents were paid regularly by them.

[The judgment then dealt with certain allegations against the *bona fides* of the composition deed, and after discussing the evidence came to the following conclusion.]

These are some of the criticisms that were levelled against the *bona fides* of the deed by the court below and advanced by learned counsel. It remains, however, to consider three other grounds on which great stress is laid against the validity of the deed and they deserve discussion at length.

It is said that the defendants second party had made up their minds to perpetrate this fraud on the creditors, more especially the plaintiff, long before the execution of the document dated the 25th of May, 1929, and it was with this object that they borrowed a sum of a lakh of rupees from the plaintiff towards the end of April, 1929. Ordinarily any fraud practised upon one particular creditor prior to the arrangement would not taint the arrangement itself, but what is said is that the borrowing in April, 1929, from the plaintiff was a part of a general scheme. The argument is that where a debtor on the verge of insolvency contracts a debt, knowing full well that he cannot discharge it, his action carries with it the badge of fraud and his associates who join him in reaping the fruits (in this case the trustees) are tarred with the same brush; and where he utilises this debt to pay some creditors, more particularly the

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trustees, there is an unequal preference and the transaction cannot be said to be *bona fide*. There cannot be the slightest doubt that the firm was running at a loss for about a year before May, 1929, and its position had become very critical in the beginning of May, 1929. From the dealings with the plaintiff's firm it is clear that it was not only in April, 1929, that a large sum was borrowed from the plaintiff's firm; in the year 1924 a sum of over a lakh was borrowed and paid; in 1925 a sum of over Rs.77,000 was borrowed and paid; in 1926 the transactions ran to Rs.75,000; in 1927 the dealings came to the figure of Rs.55,000; in 1928 a sum of Rs.84,000 was borrowed and paid and the year 1929 begins with an opening balance in favour of the plaintiff of Rs.379-14-6. Before the 21st of April, 1929, when the first hundi of Rs.14,000 in connection with the sum of one lakh was passed, there were dealings to the extent of about Rs.7,000. The sum of one lakh was made up of nine Calcutta hundis ranging between the 21st and 24th of April, 1929. With the exception of one hundi for Rs.14,000 the hundis were cashed at Cawnpore. The amount of the Rs.14,000 hundi was spent at Hathras, and is shown in the account. The amount of the remaining hundis was sent to Bombay. How they were utilised at Bombay is also clear from the account. A perusal of the books of the firm shows that at Bombay a sum of Rs.3,28,350 was received from the 24th April, 1929, to the 8th May, 1929. It also appears that between these dates a sum of Rs.3,23,457 was paid by the debtors towards their liabilities. The moneys were received in the ordinary course of business and were paid in the ordinary course of business to avert a crisis. It is clear that no money was kept by the debtors themselves for their own private gain.

The second attack is that some of the trustees were given undue preference. [After discussing in detail the evidence bearing upon the nature of the dealings alleged to amount to undue preference the judgment arrived



at the following conclusion.] These are all the dealings with some of the trustees about which an attempt was made to engender suspicion in our minds, but as explained above the suspicions have been completely removed.

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The third attack which on the face of it appears to be a very powerful attack was that although the composition deed bears date the 25th of May, 1929, yet it is engrossed on a stamp paper which was purchased on the 12th of March, 1929, and it is said that the debtors had decided upon the plot as early as the 12th of March, six weeks before the loan from the plaintiff. It might be mentioned that the person who was best competent to explain this seeming anomaly was the solicitor Mr. Damodar Das and as no question was put to him on the point, no adverse inference ought to be drawn against the defendants . . . The fact, however, remains that the composition deed was filed in court in August, 1930, when the plaintiff brought suit No. 42 of 1930 for the recovery of his loan and the plaintiff obviously knew or ought to have known the date of the stamp paper, and his failure to cross-examine the solicitor on the point disentitles him to take advantage of the discrepancy between the date when the stamp paper was purchased and the date when the document was executed.

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There now remains to consider one question of law which was argued at great length before us. We made a passing reference to this question in the beginning of our judgment when we said that the plaintiff in his plaint at two different places commented on the fact that the composition deed was not registered and the defendants equally in their written statements said that there was no necessity for the composition deed to be registered. It is a pity that no issue was struck by the court below on that point and no finding was given by the learned Subordinate Judge. The plea that the document is invalid for want of registration is based



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principally on section 5 of the Trusts Act, but it is said that because of clause (2)(i) of section 17 of the Indian Registration Act a composition deed does not require registration. Before the plaint property can be said to be not attachable and saleable in execution of the plaintiff's decree, it must be shown that the property has passed out of the ownership of the defendants second party and has vested in the defendants first party. The document must be said to be a conveyance before the defendants can succeed and as it purports to create or to assign a vested interest in immovable property of the value of Rs.100, the document should be registered under section 17(1)(b) of the Indian Registration Act. So far as the Registration Act itself is concerned, we are of the opinion that by reason of the exemption contained in clause (2)(i) of section 17 of the Act the document does not require registration, but the plea under section 5 of the Indian Trusts Act remains. We propose, before noticing the cases that were cited by Sir *Tej Bahadur Sapru*, to give our own view on the subject, which is in disagreement with the opinion of the Bombay High Court. It is true that clause (2) of section 17 of the Registration Act distinctly provides that nothing in clause (b)—and it is only under clause (b) that the document might require registration—applies to any composition deed, but this does not mean that if a document requires registration under any other enactment the exemption contained in clause (2) would prevail against that other enactment. What the Registration Act provides is that a composition deed, so far as it purports or operates to create, declare, assign, limit or extinguish whether in present or in future any right, title or interest whether vested or contingent of the value of Rs.100 and upwards to or in immovable property, will not require registration, but it does not say that any composition deed if it purports to do or operates to do anything else will not require registration either. A trust is something different from the mere creation or

assignment of a right in immovable property. A trust provides for something more than mere creation or assignment of a right in immovable property. This is obvious from the fact that a trust contemplates the author of the trust, the trustees, the beneficiaries, the trust estate and the manner in which the trust is to be administered. It is, however, contended that there is a presumption that a subsequent general enactment is not intended to interfere with a special enactment unless the intention to do so is very clearly manifested, and in support of this contention reliance is placed on the cases of *Barker v. Edger* (1), *Mary Seward v. The owner of the "Vera Cruz"* (2) and *Corporation of the City of Montreal v. Montreal Industrial Land Co., Ltd.* (3). We concede that when the legislature has given its consent to a separate subject and made provisions for it, the presumption is that a subsequent general enactment will not override the special provisions contained in the earlier enactment dealing with the separate subject unless such an intention is made clear, but the principle laid down in the cases mentioned above is not applicable to the facts of the present case. The Registration Act and the Trusts Act may both be said to be enactments dealing with special subjects and both of them equally might be said to deal with general subjects. As we pointed out before, there is no conflict between the two Acts so far as the question of registration is concerned and the presumption to which reference has been made can only be invoked when there is an attempt by the general Act to interfere with the special enactment. The exemption relating to composition deeds was mentioned for the first time in the Registration Act of 1866 and continued in 1877 and 1908. The Trusts Act was brought on the statute book in the year 1882 and the contention for the appellants is that if it was intended that a composition deed, if it provided for the machinery

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(1) [1898] A.C., 748.

(2) (1884) 10 App. Cas., 59.

(3) A.I.R., 1932 P.C., 252.

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of a trust, should be liable to registration, the Registration Act of 1908 could undoubtedly have made some provision for it. We do not, however, think that it was necessary that a distinct provision should have been made in the Registration Act; on the contrary if it was intended that the exemption from registration in connection with a composition deed as mentioned in the Registration Act should also apply when the composition deed happened to operate as a trust deed as well, there should have been a saving clause in the Trusts Act. As a matter of fact the preamble of the Trusts Act has a saving clause and it says that nothing therein contained affects the rules of Muhammadan law as to wakf, or the mutual relations of the members of an undivided family as determined by any personal or customary law, or applies to public or private religious or charitable endowments, or to trusts to distribute prizes taken in war among the captors; but it nowhere says that it does not apply to trusts created by a composition deed. The Registration Act simply says what documents require registration in a general manner. It also exempts for purposes of the Registration Act certain documents from registration either by express words of exemption or by implication. It is very easy to think of an example of exemption by implication. It is implied that a conveyance of immovable property of the value of less than Rs.100 does not require registration, but it is clear that it is permissible to the legislature by a subsequent enactment to say that henceforth certain kinds of conveyances of properties of less than Rs.100 will be valid only if effected by means of a registered instrument and no well established principle relating to the interpretation of statutes will be affected thereby. We are, therefore, of the opinion that the above mentioned cases cited by learned counsel for the appellants have no application to the present case and are clearly distinguishable.

We now propose to discuss the cases that were cited before us. We might mention at once that cases which

were decided before the Trusts Act have obviously no application because we are of the opinion that the document before us requires to be registered not under the provisions of the Registration Act but only under the provisions of the Trusts Act. The cases in *Bomanjee Manockjee v. Nowrojee Pallonjee* (1), *Trustees of Palmer's estate v. Colonel Bomgartner* (2) and *Bapuji Auditram v. Umedbhai Hathesing* (3), already referred to above, are of no importance. In *Subbaraya v. Vythilinga* (4) and in *Manindra Chandra Nandy v. Lal Mohan Ray* (5) the point relating to the Trusts Act was not taken. There are only two cases in which the point was discussed. They are *Malukchand v. Manilal* (6) and *Chandrashankar v. Bai Magan* (7). In the latter case some strength was sought to be obtained from the description of the expression "composition deed" as given in the Stamp Act and it was thought that "the Stamp Act is in large measure *in pari materia* with the Registration Act". With great respect to the learned Judges, we are of the opinion that the two enactments are not *in pari materia*. The Stamp Act is a purely fiscal Act providing for the payment of Government revenue, whereas the Registration Act has for its objective the conservation of evidence, assurance of title, publicity of documents and prevention of fraud, and it is not permissible to interpret one word used in one enactment by a reference to its description in a different Act altogether. As pointed out before, the exemption from registration is available to a composition deed only to the extent that it purports to create or assign a right in immovable property and not when it amounts to a trust which obviously contemplates something more than the mere creation or assigning of a right in immovable property. In *Chandrashankar v. Bai Magan* (7) the learned Judges simply say that for the reasons given in

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(1) (1864) 1 Bom. H.C.R., 233. (2) [1868] N.W.P., H.C.R., 104.  
(3) (1871) 8 Bom. H.C.R., 245. (4) (1892) I.L.R., 16 Mad., 85.  
(5) (1929) I.L.R., 56 Cal., 940. (6) (1904) I.L.R., 28 Bom., 364.  
(7) (1914) I.L.R., 38 Bom., 576(595).

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*Malukchand's* case (1) a composition deed does not require registration under the provisions of section 5 of the Trusts Act of 1882. The reasons given in *Malukchand's* case (1) are that if there is an element of trust in a composition deed, that element enters into it as a mere accident and it is not the essence of it. With great respect we are unable to agree with this. It is true that in a composition deed the essence is undoubtedly the compounding of debts, but where it lays down the machinery of a trust, the trust is an integral part of it and the trust contained therein cannot be said to be accidental or incidental. Another reason given by CHANDAVARKAR, J., is that in a composition deed the property of the debtor vests in the trustee only for the purpose of giving effect to the terms of the composition and "the ownership of the property remains in the debtor and the property is transferred to the trustee for the benefit of the creditors". This reasoning cannot now be supported in view of the dictum of the Privy Council in the case of *Bank of Upper India, Ltd. v. Kaniz Abid* (2), where their Lordships say that when once a deed of trust is executed and property conveyed to the trustee for the benefit of the creditors of the author of the trust and for other purposes recited in the deed the author of the trust ceases to have any interest in the property conveyed by the deed of trust. For the reasons given above we find ourselves unable to agree with the view of law taken by their Lordships of the Bombay High Court on the question of registration and we are of the opinion that so far as the composition deed is a trust deed, it is not valid because of the fact that it is not registered.

The learned counsel for the appellants, however, put in two applications before us, one for the reception of additional evidence under order XLI, rule 27 of the Civil Procedure Code and the other for the amendment of pleadings under order VI, rule 17 of the Civil

(1) (1904) I.L.R., 28 Bom., 364(367). (2) [1935] A.L.J., 785.

Procedure Code. So far as the application for the reception of additional evidence is concerned, we are of the opinion that it has no force, for the document now sought to be brought on the record was not produced before the court below and it cannot be said that that court rejected a piece of evidence which it should have accepted, nor can it be said that we require the document for the purpose of pronouncing judgment, nor again can it be said that the said document was not within the knowledge of the applicant. The application for the amendment of pleadings, however, stands on a different footing and we think that in the interests of justice that application ought to be allowed. It is conceded that the pleadings might be allowed to be amended at any stage of the proceedings even before an appellate court, but the principal safeguard in a matter of this kind is that the other side should not in any way be prejudiced or taken by surprise nor should a new case be attempted to be made out by the altered pleading. To a certain extent there would be a little inconsistency when a new plea is allowed to be taken, but that in itself should not be the reason for refusing an application for amendment. It is true that the plaintiff did mention pointedly in his plaint that the composition deed was not registered and it is equally true that the defendants said that the document did not require registration and they did not in the same breath say that even if the document required registration the defect was cured by the fact that there was another document dated the 6th of June, 1929, in their possession which was registered and which should be read with the document dated the 25th of May, 1929. The fact however remains that no issue was struck on that point and it may well be that if such an issue had been struck the defendants might have been better advised and might have asked the court below to allow them to amend their written statement by mentioning the document of June, 1929. There are certain other facts which might be taken into

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consideration in this connection. The defendants carried on their business in Bombay, the deed was drawn in Bombay, the solicitor at Bombay advised them that the document did not require registration and his advice was based on two decisions of the Bombay High Court that a composition deed did not require registration. The deed was produced before the executing court when the plaintiff sought execution of his decree and the trustees intervened and the learned Subordinate Judge there held that the deed did not require registration. Under these circumstances there is no wonder that the defendants were lulled into a sense of security and the interests of justice require that they should be allowed to amend their pleadings and permitted to produce the document, dated the 6th of June, 1929. In this view it would be necessary for the case to go back to the court below with opportunity given to the defendants to produce evidence for the purpose of proving the document and such other evidence as might be relevant to the document in question, and the plaintiff should be given an opportunity to produce such evidence as he deems fit to produce in rebuttal.

We have so far considered the various objections that were advanced against permitting the defendants to amend their written statement and have come to the conclusion that the defendants should be permitted to amend their written statement, but it is further said that the defendants cannot in any way better their position by the production of the document dated the 6th June, 1929. It is enough for us to say that it is not for us to decide the point. The contention of the appellants is that the document dated the 25th of May, 1929, not requiring registration under section 17 of the Act, there is nothing in section 49 to prevent its admissibility in evidence. The document being admissible in evidence it can be read together with the subsequent document, and if so read together a trust is created and the property conveyed to the trustees, and no objection can be



taken on the ground of want of registration inasmuch as the second document is registered and the trust is therefore valid. It is not necessary for us to decide whether there is any force in this plea or not and we in no way fetter the discretion of the court below on this point, inasmuch as we have not heard the other evidence of the parties which they might be advised to produce and the arguments that might be advanced in favour of the contending parties at a subsequent stage when the whole evidence is available.

The result of what we have said above is that we allow this appeal to this extent that we set aside the decree of the court below and remand the case to that court under our inherent jurisdiction with directions to that court to readmit the suit on its original number in the pending file and to dispose of it according to law after giving the defendants an opportunity to amend the pleadings in the light of their application dated the 12th of August, 1935, and to produce the document dated the 6th of June, 1929, and such other evidence as might be necessary for the purpose of proving the document and such other evidence as might be relevant to it, and the plaintiff should also be given an opportunity to take such plea as might be available to him in rebuttal and to produce such evidence as might be relevant to the question. Costs here and heretofore will abide the event.

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## MISCELLANEOUS CIVIL

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Before Mr. Justice Niamat-ullah and Mr. Justice Bajpai  
SRI SWAMI RANGACHARYA (APPLICANT) v. GANGA  
RAM AND OTHERS (OPPOSITE PARTIES)\*

*Civil Procedure Code, section 92—Suit for settling a scheme for management of public religious trust—Decree settling scheme and giving liberty to apply for modification of scheme from time to time—Reservation of power to modify the scheme not ultra vires—Application for removal of a trustee for misconduct is not entertainable—Jurisdiction—Inherent power—Civil Procedure Code, section 151.*

In a suit under section 92 of the Civil Procedure Code for settling a scheme of management for the trust the court passed a decree laying down a detailed scheme and further provided in the decree that it would be open to any two members of the trust committee or any two other persons interested in the trust to apply to the court for any modification of the scheme which might from time to time be considered necessary or desirable in the interest of the trust or for the protection of the trust property. Some years afterwards an application was made to the court by two persons interested in the trust, praying (a) that a modification be made in the method of selection of the president of the trust committee and in the rules regarding quorum at meetings of the committee; and (b) that the present president be removed from office on the ground that he had committed mismanagement and misappropriation, and that steps be taken to trace and recover the misappropriated property.

*Held*, that the court had jurisdiction to reserve to itself the power to amend the scheme in future, *suo motu* or otherwise; and if, in order to minimise the chances of frivolous motions being made, it announced that it would not exercise such power unless at least two persons interested joined in the application, that was of no significance on the question of the existence of such power. There is nothing in section 92 of the Civil Procedure Code which makes the reservation of a power to modify the scheme in future *ultra vires*. The power of the court to settle a scheme for the administration of a trust is sufficiently comprehensive to include a provision which makes the scheme alterable by the court if necessary in future. If the scheme is amended subsequently by the court within the limits laid

\*Miscellaneous Case No. 10 of 1934.

down by the decree, the court is giving effect to its own decree rather than amending it. In so far as the present application sought modification of the scheme in the exercise of the court's power reserved by the scheme itself, the application was therefore maintainable.

In so far as the present application sought reliefs outside the scope of the court's power of modification reserved by the scheme itself, the only section which could justify such alterations or amendments of the scheme was section 151 of the Civil Procedure Code. The inherent power of the court to modify a scheme prepared by itself should be exercised within the narrow scope of where it is necessary to prevent abuse of the process of the court or where the ends of justice plainly demand it. The prayer in the application for removal of the president on the ground of misconduct could not be entertained, conformably with the provisions of the scheme; the fact that a particular officer, appointed in accordance with the scheme, has misbehaved was no ground for modification of the scheme itself; the remedy was by way of a suit brought under section 92 for his removal. The prayer for the tracing and recovery of the misappropriated property was not a matter of modification of the scheme either within the power reserved or within the inherent power of the court, and was not entertainable on the application.

Dr. K. N. Katju and Messrs. Janaki Prasad, V. D. Bhargava and Gajadhar Prasad Bhargava, for the applicant.

Dr. N. P. Asthana and Messrs. G. Agarwala, B. N. Sahai, Kartar Narain Agarwala and Satya Narain Agarwala, for the opposite parties.

NIAMAT-ULLAH and BAJPAI, JJ.:—This is an application by two persons interested in the temple of Rangji situate in Brindaban, district Muttra, praying for modification of the scheme settled by this Court in First Appeal No. 355 of 1922, which had arisen out of a suit under section 92 of the Civil Procedure Code.

The application is mainly based on a provision contained in paragraph 21 of the scheme which reserves powers to the court to modify it at the instance of any two trustees or any two persons interested in the trust. The application also implies a prayer for certain reliefs,

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apart from the exercise of the power reserved by the provision already referred to.

A preliminary objection is taken by the opposite party that the application is not maintainable. It is contended that the court becomes *functus officio* after the termination of the suit under section 92 of the Civil Procedure Code and cannot modify the scheme settled by it and made part of the decree in the suit and that the provision in the scheme reserving power to the court to modify it is *ultra vires*.

The scheme as originally prepared by this Court provided in paragraph 4: "The trust shall be administered by a committee consisting of the *gaddinashin* of the Sri Rangji's temple, Brindaban, for the time being, as president, and six other members, selected from among the followers of the Vaishnava faith and preference shall be given in making such selection as far as it may be practicable to persons belonging to the Tingal sampradaya." As part of the scheme Swami Rangji was appointed to the office of the *gaddinashin*, subject to the conditions laid down in a supplementary deed of trust, dated the 3rd of November, 1873, which renders him liable to be removed on the happening of certain contingencies therein specified. A number of trustees were nominated in the scheme which made provisions for succession to the office of the trustee in case of vacancy. It was also laid down that three members of the committee would form a quorum but that if a meeting is adjourned for want of a quorum no such quorum would be necessary for the adjourned meeting.

In the application now made it is prayed that the scheme be so amended as to throw the office of the president open to election by the members of the committee and that the provision whereunder the *gaddinashin* is the ex officio president be deleted. Modification of the scheme is also sought in respect of the quorum. It is desired that the presence of three

trustees should be made necessary even for an adjourned meeting. Another prayer is that the present *gaddinashin* be removed from the office of a trustee and that of the president and that a manager be appointed for which a provision already exists in the scheme.

It is alleged in an affidavit filed in support of the application that the *gaddinashin* has mismanaged the affairs of the trust and has misappropriated considerable property including fourteen Government promissory notes. It is prayed that steps be taken to trace and to recover the notes and action be taken against those found to have been guilty of misappropriation of the funds belonging to the endowment. There is a general prayer asking for orders in respect of the proper management and control of the temple and property belonging thereto.

Paragraph 21 of the scheme, on which the application is principally based, runs as follows: "It shall be open to the trust committee or any two members of the trust committee or any two other persons interested in the trust to apply to the Hon'ble High Court for directions in regard to any matter not covered by this scheme or for any modification of this scheme which may from time to time be considered necessary or desirable in the interest of the trust or for the protection of the trust property." It is contended that the suit under section 92 having been completely decided and a decree embodying the scheme having been formally passed, it is not open to the court to pass any orders amending the scheme, the court having exhausted its jurisdiction by passing a decree in the suit. It is said that if the removal of a trustee or any direction for the proper administration of the trust is necessary, a fresh suit under section 92, instituted with the permission of the Advocate-General, is the only remedy open to the persons who are dissatisfied with the administration of the trust. It is pointed out that the scheme is part

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of the decree passed under section 92 and that amendment of the scheme is the amendment of the decree which is not permissible except in terms of section 152 of the Civil Procedure Code which does not apply. Lastly it is contended that the Court cannot reserve to itself the power to amend its decree and that the provision reserving a power to this Court to modify the scheme is *ultra vires* and cannot be given effect to. The case of *Veeraraghavachariar v. Advocate-General of Madras* (1) is strongly relied on by the learned advocate for the opposite party. It was held by a Full Bench of the Madras High Court in that case that "If in a decree for a scheme framed under section 92, Civil Procedure Code, liberty is given to persons to apply to the court for directions merely to carry out the scheme already settled, such reservation of liberty in the decree will be *intra vires* if the assistance of the court can be given without offending against section 92; but where liberty is given to apply to the court for alteration or modification of the scheme, such reservation is *ultra vires* as offending against section 92." The *ratio decidendi* seems to be that reliefs of the nature described in section 92 can be sought only by instituting a suit in the manner laid down by that section and that it is not open to the court to allow one of those reliefs (*viz.*, settling a scheme, which is involved in the alteration of a scheme already settled) being sought by an application only. It seems that this view lays too great, and if we may say so with respect, unnecessary stress on the right given to a person to apply for the alteration of a scheme previously settled. The real question is whether the court can reserve to itself the power to amend the scheme *suo motu* or otherwise. If the court can do so, the fact that it is moved by an interested person is of no importance. Where the court has a power, it may, to minimise the chances of frivolous motions being made, make it known that it will not

(1) (1927) I.L.R., 51 Mad., 31.

exercise such power unless no less than two persons join in applying for the exercise of it. To our minds this is the only effect of the provision in the scheme which reserves to the court a power to amend it on an application being made by two persons interested in the trust. As already stated, the real question is whether the court had jurisdiction to retain a power to alter the scheme. We are unable to find anything in section 92 which makes the reservation of a power to modify the scheme in future *ultra vires*. The power of the court to settle a scheme for the administration of a trust is sufficiently comprehensive to include a provision which makes the scheme alterable by the court if it is found necessary in future. We are not impressed by the argument that unless the suit under section 92 is taken to remain pending for all times, the exercise of the power to amend the scheme necessarily implies amendment of the decree. The suit must undoubtedly be deemed to have terminated with the passing of the decree which according to its definition implies a final adjudication of the rights of the parties to it. The settlement of a scheme is part of the adjudication and if the scheme is made elastic the finality of the adjudication is not affected. If the scheme is amended subsequently by the court within the limits laid down by the decree the court should be deemed to be giving effect to its own decree rather than amending it.

There is considerable authority against the view taken in the Madras case which was expressly dissented from in *Chandraprasad Ramprasad v. Jinabharthi Narayan* (1). *Manadananda Jha v. Tarakananda Jha Panda* (2), *Sadupadhya Umeshanand Oja v. Maharaja of Gidhour* (3) and *Mahomed Waheb Hussain v. Syed Abbas Hussain* (4) are also authorities to the contrary. *U Po Maung v. U Tun Pe* (5) is not a case in point. The power to modify the scheme does not appear to

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(1) (1930) I.L.R., 55 Bom., 414.

(2) A.I.R., 1924 Cal., 330.

(3) (1917) 43 Indian Cases, 772.

(4) A.I.R., 1923 Pat., 420.

(5) (1928) I.L.R., 6 Rang., 594.

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have been reserved in that case. *Shera Khan v. Bhure Shah* (1) is likewise not in point. In that case the scheme settled under section 92 appointed a committee of three persons, who were empowered to visit the shrine and to dismiss a mutwalli and appoint another in his place. This power was exercised by the committee, and the dismissed mutwalli applied to the court complaining against the action of the committee. The District Judge dismissed his application. On an application for revision from his order it was held by a Division Bench of this Court that the order of the District Judge was correct. There was no question as to whether a power reserved in the scheme prepared under section 92 could not be exercised, the reservation being *ultra vires*. An earlier case decided by this Court, *Mohunt Darshan Das v. Collector of Meerut* (2) does not also touch the point. All that was held in that case was that the Code of Civil Procedure gives no power to the District Judge to take any action in order to protect property forming the subject-matter of a public endowment unless and until a regular suit is filed in his court under section 92. In that case the District Judge had appointed a trustee, and among the other directions given to him one was that he should file an account within a certain time. The order of the District Judge was not complied with, and the Judge prohibited the trustee from "having any further dealings with the property of the *gaddi*", and a proclamation was issued in the villages belonging to the *gaddi* that no rents should be paid to the trustee. This extraordinary order of the District Judge was reversed in revision by this Court.

For these reasons we are led to the conclusion that both on principle and authority it must be held that the provision reserving a power to the court preparing a scheme under section 92 to modify it is not *ultra vires*.

(1) [1935] A.L.J., 311.

(2) (1918) 16 A.L.J., 742.



In so far as the present application seeks modification of the scheme, not in the exercise of the court's power reserved by the scheme itself, but wholly apart from it, we are of opinion that the only section in the Civil Procedure Code which can justify amendment of the scheme is section 151 of the Civil Procedure Code. Dr. *Katju*, the learned counsel for the applicant, referred us to certain dicta in English cases in which it was held that a court settling a scheme in relation to an endowment has inherent power to modify it subsequently and in ordinary circumstances. We put it to him whether that was not equivalent to exercise by a court in this country of its inherent power contemplated by section 151. The learned advocate agreed that the only rule of law to be found in the Civil Procedure Code under which the court could modify the scheme in the exercise of its inherent power was section 151. In our opinion the inherent power of the court to modify a scheme prepared by itself should be exercised where it is necessary to prevent abuse of the process of the court or where the ends of justice plainly demand it. In considering the merits of this application we shall bear in mind the comparatively narrow scope of section 151 where we are called upon to modify a scheme apart from the power reserved by paragraph 21 thereof. The result is that we repel the preliminary objection and proceed to dispose of the application on the merits.

Coming to the merits of the application we find that the main object of the applicants is to have the present *gaddinashin* removed from the offices of the president and a trustee. It is alleged in the affidavit that he has misappropriated large sums of money. A reference is particularly made to fourteen Government promissory notes which, it is said, have disappeared. It is quite clear that we cannot entertain an application for removal of the president or a trustee on the ground of misconduct. The scheme provides that if the office of a trustee falls vacant the other trustees shall fill up the

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vacancy by appointing a suitable person. There are provisions in the scheme for the removal of a trustee by the trustees themselves. It is impossible for this Court to entertain an application for the removal of the trustee conformably with the provisions of the scheme. The applicants were apparently alive to the difficulty on this score and have, therefore, applied for the modification of the scheme, so that if under the modified scheme the *gaddinashin* ceases to be the president ex officio the office is to be filled up by the trustees. Similarly if the scheme is amended as desired by the applicants, the *gaddinashin* will cease to be a trustee under the modified scheme. It is thus clear that it is only through a modification of the scheme that they can secure the removal of the *gaddinashin* from the offices of the president and a trustee. We have considered the scheme as a whole and find that it is an admirable scheme and is likely to work satisfactorily in normal circumstances and that no case has been made out for amending it in any respect. Assuming, as is alleged, that the present *gaddinashin* has not fulfilled the expectations which were formed of him by those interested in the trust, it is not the fault of the scheme. The merit of a scheme cannot be judged from its unsuccessful working in one or two instances, assuming such is the case in the present instance. For these reasons we decline to modify the scheme so as to provide that the *gaddinashin* shall not be the ex officio president of the Board of trustees and that he shall not by virtue of his office as *gaddinashin* be a trustee. It is open to two or more persons interested in the trust to institute a suit under section 92, of course, with the permission of the Legal Remembrancer, for the removal of the *gaddinashin* from one or more of the positions he now occupies, for alleged misconduct. But assuming such allegation is well founded—a point on which we express no opinion—it does not justify the assump-

tion that the general rule contained in the scheme has been found by experience to be unsatisfactory.

The next question is whether the provision in the scheme relating to the quorum requires any modification. As already stated, the scheme makes a quorum of three out of seven trustees necessary for the transaction of any business. This is a desirable rule and is not objected to. It is said that in so far as it provides no particular quorum for an adjourned meeting it should be amended so as to require the presence of at least three trustees on an adjourned meeting also. We do not think that such a provision is at all desirable. It is presumed that the trustees are persons interested in the endowment and are prepared to make some sacrifice of time. The scheme provides that in case a trustee ceases to attend meetings of the Board of trustees for a period of two years he renders himself liable to be removed by the other trustees. We think that this provision is sufficiently deterrent against habitual absence of trustees from meetings. Any provision requiring the presence of at least three members out of seven at all adjourned meetings is likely to work very unsatisfactorily on certain occasions and will in any case be conducive to delays.

The only other matter that requires consideration is the grievance of the applicants that no manager has been appointed as required by the scheme. This is emphatically denied by the opposite party. It is not necessary for us to inquire into the question of fact whether a manager has not been appointed as is alleged by the applicants. According to the scheme the Board of trustees should appoint a manager for the discharge of certain duties. If the Board has failed to discharge its obligation under the scheme, the proper remedy for the applicants is to take appropriate proceedings for the enforcement of such obligation. We cannot direct any more than what has been done by the scheme prepared

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by this Court, viz., that the Board of trustees should appoint a manager.

Lastly so far as our orders are sought in respect of the missing Government promissory notes and the misappropriation of funds, we are of opinion that no action can be taken by this Court on a miscellaneous application like the one before us. We cannot obviously pass any orders in that behalf in the exercise of our inherent jurisdiction, assuming we possess power in that connection, nor can we give any directions in respect of the proper management of the affairs of the temple.

The result is that this application fails and is dismissed with costs which we assess in all at Rs. 500.

### APPELLATE CIVIL

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October, 3

*Before Mr. Justice Niamat-ullah and Mr. Justice Allsop*

KHUDAWAND KARIM (DEFENDANT) v. NARENDRA  
NATH AND ANOTHER (PLAINTIFFS)\*

*Transfer of Property Act (IV of 1882), section 82—Contribution—“Contract to the contrary” refers primarily to a contract between the co-mortgagors—Imperial contract against contribution where one mortgagor is really a surety for the other—Whether contract against contribution can run with the land—Evidence Act (I of 1872), section 92—Whether contract among co-mortgagors in modification of the statutory rule of contribution can be proved.*

Where a mortgage deed has been executed by two persons, each of whom has mortgaged his own property, a contemporaneous agreement between the co-mortgagors can be proved to the effect that one of them was the real debtor who took the whole money and the other was merely his surety and that in the event of the whole of the mortgage money being realised from the property of the principal debtor he would have no right of contribution as against the property of the surety. Section 92 of the Evidence Act does not bar the proving of such agree-

\*Second Appeal No. 1270 of 1933, from a decree of Harish Chandra, District Judge of Bareilly, dated the 6th of September, 1933, reversing a decree of Zorawar Singh, Subordinate Judge of Bareilly, dated the 23rd of February, 1932.

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ment, for it does not vary the terms of the contract expressed in the deed of mortgage inasmuch as there is no covenant in that deed regarding the right of contribution as between the co-mortgagors; the right of contribution arises only out of the statutory provisions of section 82 of the Transfer of Property Act. Further, the words "as between the parties to any such instrument" in section 92 of the Evidence Act would refer to the persons who on the one side and on the other come together to make the contract and would not apply to questions raised between the parties on the one side only of a deed regarding their relations to each other.

From the terms in which section 82 of the Transfer of Property Act is expressed, there is no justification for concluding that "a contract to the contrary" mentioned therein is a contract between the mortgagor and the mortgagee. In fact the mortgagee has no interest in the question of contribution as between the various parts of the mortgaged property, for he is entitled to proceed against the whole or any part of the mortgaged property. There is thus no reason why he should be a necessary party to any contract which involves the right of contribution, and the "contract to the contrary" would therefore be a contract between the co-mortgagors. Such a contract would include an implied agreement between the surety and the principal debtor. The owners of two mortgaged properties may contract themselves out of the rule contained in section 82; and as such a contract operates between the co-mortgagors alone, the mortgagee is not a necessary party, and his not being a party can not make the contract unenforceable as between the co-mortgagors.

But the agreement, in modification of the rule of contribution laid down in section 82, between the mortgagors being personal will not run with the land, and a transferee for value without notice from one of the mortgagors will not be bound by the personal undertaking of his transferor and can not be deprived of the statutory right of contribution which attaches to the land transferred to him.

Dr. S. N. Sen and Messrs. B. Malik and Shah Habeeb, for the appellant.

Mr. G. S. Pathak, for the respondents.

ALLSOP, J.:—This is a second appeal against an appellate decree passed by the learned District Judge of Bareilly. The appellant as described upon the record is the Almighty through Mst. Kaniz Fatma and

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Mst. Fakhr-un-nissa, but it is admitted that we may treat the appeal as having been instituted by the two ladies in their capacity as mutwallis of a wakf. It is the result of a suit for contribution arising out of a deed of mortgage executed in the year 1917 by Mst. Imtiaz Begam, Ziauddin and Fazal Ahmad in favour of Nand Ram. Ziauddin was the son and Fazal Ahmad the brother of Mst. Imtiaz Begam. The property mortgaged consisted of a shop and a house belonging to this lady and a shop and a house belonging to Fazal Ahmad. Nand Ram instituted a suit on the basis of the mortgage. Fazal Ahmad set up the plea that he had signed the deed merely to accommodate the other mortgagors and that he was to be treated merely as a surety for them. The learned Subordinate Judge who decided the suit was of the opinion that it was not necessary for him to record any finding upon this plea because all the mortgagors were equally liable to the mortgagee whether Fazal Ahmad's allegation was true or not. He gave the mortgagee a decree against the mortgagors but he did decide that the property should be sold in two lots, that is, that the property of Mst. Imtiaz Begam should be sold first and that the property of Fazal Ahmad should be sold only if the property belonging to Mst. Imtiaz Begam did not fetch a price which was sufficient to satisfy the decree. After the decree was passed Mst. Imtiaz Begam paid Nand Ram one sum of Rs.300 on the 28th of September, 1922, and another sum of Rs.1,000 on the 21st of August, 1924. After that her house was auctioned and sold for a sum of Rs.1,005. This sum was sufficient to discharge the balance of the liability on the decree.

Some time after that Mst. Imtiaz Begam died. Her heirs were Ziauddin and his sister. This sister also died and was succeeded by her two daughters who sold their interest in the property of Mst. Imtiaz Begam to Ziauddin. Ziauddin then transferred half of the property to Babu Narendra Nath.

Ziauddin and Narendra Nath instituted the suit which has given rise to this appeal in order to recover from Fazal Ahmad's property his share of the money paid by Mst. Imtiaz Begam to the mortgagee and of the money delivered to the mortgagee after the sale of the house. In the meanwhile Fazal Ahmad had created a wakf of his property and the appellants were impleaded as defendants.

They raised the same plea that Fazal Ahmad had raised in the previous suit. They said in the written statement that Fazal Ahmad did not borrow any money from Nand Ram, but in reality Imtiaz Begam and her son named Ziauddin had borrowed the money, inasmuch as Ziauddin stood in need of money for the purpose of trade; they also said that the position of Fazal Ahmad was merely as a surety, and he did not get any sum out of the mortgage money, that Fazal Ahmad had no necessity to borrow money and that he, merely having regard to the relationship with Imtiaz Begam and Ziauddin, got his name entered in the mortgage deed in the capacity of a surety for the satisfaction of Nand Ram. The learned Subordinate Judge in the court of first instance decided that these allegations were true and he dismissed the suit. In appeal the learned District Judge did not express any opinion upon the truth of the statements made by the mutwallis. He decided the appeal on the assumption that the statements were true. He applied the provisions of section 82 of the Transfer of Property Act which says: "Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage." The learned Judge says: "The section itself is very clearly worded and in the absence of a contract to the contrary a property subject to a mortgage is liable to contribute

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rateably to the debt secured by the mortgage. No such contract was even alleged in the written statement. Nor has any attempt been made to prove the existence of such a contract. It has been argued that as Fazal Ahmad was merely a surety, section 82 of the Transfer of Property Act has no application to his property." It seems to me that the learned Judge relied upon the fact that there is no clear allegation in the written statement that there was a specific agreement between the mortgagors themselves or between the mortgagors and the mortgagee. I think, however, that the intention of the defendants was clearly to allege that there had been an agreement between the three mortgagors that the money borrowed should go to Mst. Imtiaz Begam and Ziauddin and that Fazal Ahmad should sign the deed merely in order to afford greater security to the mortgagee.

That being so, the first thing which is to be decided is whether the finding of fact recorded by the learned Subordinate Judge was right or not. [After discussing the evidence the judgment proceeded] I have no hesitation in agreeing with the learned Subordinate Judge that the mortgagors did enter into the agreement which the defendants appellants have set up. There is no necessity for remanding this case to the learned District Judge for a finding upon the question of fact, as there are sufficient materials before us to enable us to decide the matter for ourselves.

It has been argued on behalf of the respondents that the provisions of section 92 of the Indian Evidence Act prevent the defendants appellants from proving the agreement, as there is no mention of such an agreement in the deed of mortgage itself and the agreement would vary the terms of the contract of mortgage. The respondents rely upon the case of *Muthukumaraswami Mudaliar v. Govinda Padayachi* (1), where the learned Judge in his judgment says: "If the mortgagors have

(1) A.I.R., 1932 Mad., 218.

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undertaken certain obligations, as for instance, that the severally owned items of the hypothecation shall be rateably liable, one mortgagor can no more set up an oral agreement against his fellow mortgagor for the purpose of varying the terms of the document than he could as against his mortgagee." The learned Judge mentions two decisions of this Court in *Mulchand v. Madho Ram* (1) and *Shamshul-Jahan Begam v. Ahmad Wali Khan* (2). It was held in the earlier case that the words in section 92 of the Evidence Act, "between the parties to any such instrument", referred to the persons who on the one side and the other came together to make the contract or disposition of property, and would not apply to questions raised between the parties on the one side only of a deed regarding their relations to each other under the contract. This decision was followed in the later case. The learned Judge of the Madras High Court seems to have doubted whether these decisions were correct, but he himself mentions that the agreement set up in the case before him was one between the mortgagee and the mortgagor so that it was not really necessary for him to come to any decision upon this point. In any event I am bound to follow the decisions of this Court, and even apart from authority I think that in the present case the question of varying the contract does not really arise. The agreement upon which the appellants based their case was one between the mortgagors that Mst. Imtiaz Begam and Ziauddin would take the whole of the money lent by the mortgagee and would be liable in the first instance to repay it while Fazal Ahmad would stand merely in the position of a surety. In other words, this was an agreement that there would be no right in Mst. Imtiaz Begam and Ziauddin to demand contribution from Fazal Ahmad if they paid off the money due to the mortgagee. This agreement could vary the contract expressed in the deed of mortgage only if

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(1) (1888) I.L.R., 10 All., 421.

(2) (1903) I.L.R., 25 All., 337.



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there was some covenant in that deed that the mortgagors would be liable to contribution as between themselves. It is not alleged that there was any such covenant. It is not suggested that the right to contribution arose out of any contract between the mortgagors; it arose out of the statutory provisions contained in section 82 of the Transfer of Property Act. I cannot see how it can be argued that the agreement between the mortgagors is set up to vary the terms of the contract of mortgage when there was no covenant in the contract of mortgage upon the matter to which the other agreement relates. I have no doubt that it was open to the defendants appellants to prove the existence of the agreement between the mortgagors if they could do so. The effect of the provisions of section 82 of the Transfer of Property Act was dependent upon the non-existence of a contract to the contrary, and it was therefore a question in issue whether such a contract existed or not.

I have based my argument upon the assumption that the agreement set up was one between the mortgagors alone, and that the mortgagee was not a party to it. The respondents have urged that the written statement, if it set up an agreement on the subject of contribution at all, set up one to which the mortgagee was a party. It seems to me that the defendants appellants in their written statement never suggested that the mortgagee had agreed that he would proceed against Fazal Ahmad's property only if the other property was not sufficient to discharge the mortgagors' liability.

I now come to another question of law. The respondents have argued that the agreement between the mortgagors, even if it is proved, is not "a contract to the contrary" within the meaning of that term as used in section 82 of the Transfer of Property Act. They have relied upon the case of *Ramabhadrachar v. Srinivasa Ayyangar* (1). In the head-note to that case

(1) (1900) I.L.R., 24 Mad., 85.

it is stated that the court held that the words, "in the absence of a contract to the contrary", in section 82 of the Transfer of Property Act applied to contracts between a mortgagor and a mortgagee and that any agreement which was binding only as between the mortgagors was not "a contract to the contrary" within the meaning of the section. The words actually used by the learned Judges were (at page 93): "Having regard to the principle upon which the equitable doctrine of contribution is based, as illustrated in the English authorities to which our attention has been called, it seems clear that an agreement binding only as between the mortgagors is not 'a contract to the contrary' within the meaning of the section, and that these words were intended to apply to contracts between mortgagor and mortgagee—contracts, for example, under which some of the mortgaged properties were to be liable in the first instance and others were only to be liable in the event of the security of the properties liable in the first instance being insufficient." I do not say that the head-note is incorrect, but, as it is expressed, it may perhaps lead to misconception, as the latter half of it may be overlooked. The learned Judges never said that a contract between the mortgagors would not be binding upon them. What they intended to say apparently was that a contract between the mortgagors alone would not run with the land so as to bind any assigns or transferees. That was a case where the property belonging to a joint Hindu family was mortgaged and there was a subsequent partition by which the mortgaged property was divided into four shares. At the time of the partition the members of the family who obtained those four shares agreed between themselves that the shares would equally bear the charge created by the mortgage. One of the shares was afterwards transferred to another person and that share was sold in execution of a decree on the basis of the mortgage. The proceeds from the sale

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were sufficient to discharge the whole of the liability. The transferee instituted a suit for contribution and the question arose whether he was bound to pay one-fourth on the mortgage debt in respect of the value of the property which had come into his hands. The learned Judges held that he was not bound by the contract between his transferor and the other members of the family. They said in fact: "The contract as between the parties, the owners of the equity of redemption, is of course binding, but it is not a contract which binds their assigns." The learned Judges never said that the contract as between the members of the family would not have been binding if one of them had sued the other for contribution after discharging the mortgage debt. I think, therefore, that this decision is not authority for the wide proposition that in any case, even when there has been no transfer, the agreement between the mortgagors alone would not be "a contract to the contrary" within the meaning of section 82 of the Transfer of Property Act so that the property even of the parties to the agreement would not be bound by it in the event of a suit for contribution in which no transferees or assigns were concerned.

The respondents have drawn our attention to three cases of this Court in which the decision in *Ramabhadrachar v. Srinivasa Ayyangar* (1) has been affirmed by this Court. These are *Charan Singh v. Ganeshi Lal* (2), *Muhammad Inámullah Khan v. Aisha Bibi* (3) and *Jai Narain v. Rashik Behari Lal* (4).

In the first case the learned Judge who delivered the judgment of the Court said: "It has been judicially held that the expression 'a contract to the contrary' in section 82 means a contract between the mortgagor and mortgagee—see the decision in *Ramabhadrachar v. Srinivasa Ayyangar* (1)—and if that is a correct statement of the law, it follows that in the present case section 82 is left to its full operation . . ." It would

(1) (1900) I.L.R., 24 Mad., 85.

(3) (1926) 24 A.L.J., 714.

(2) (1926) 24 A.L.J., 401.

(4) A.I.R., 1931 All., 546.

appear, therefore, that he was not saying definitely that the decision was correct.

In the second case, MEARS, C.J., certainly did say: "It has been held in *Ramabhadrachar v. Srinivasa Ayyangar* (1) that the 'contract to the contrary' referred to in section 82 of the Transfer of Property Act means a contract between the mortgagor and the mortgagee. This decision has been approved of recently by a Bench of this High Court in the case of *Charan Singh v. Ganeshi Lal* (2)."

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In both these cases, however, it was not necessary to consider the question at all because they were cases in which the mortgagee was attempting to rely upon a contract between the mortgagors alone, that is a contract to which he was no party and it was sufficient for the purposes of those cases to hold that a person cannot rely upon a contract to which he is no party. The case of *Charan Singh* was taken in appeal to the Privy Council: *Ganeshi Lal v. Charan Singh* (3). Their Lordships in delivering the judgment did not make any reference to the case of *Ramabhadrachar v. Srinivasa Ayyangar* (1), nor did they rely upon the principle set forth in that case. "The appellants", they said, "bought subject to the mortgage and paid a price for the property on that footing, and their contention really amounts to this, that having paid for the property on the basis of its being subject to the mortgage they ought now to be allowed to have the benefit of it free from the mortgage and that without making any payment towards the attainment of that satisfactory result." The learned Subordinate Judge had relied on the case of *Muhammad Abbas v. Muhammad Hamid* (4), and referring to this case their Lordships said: "The decision in the case to which the Subordinate Judge referred may be justified on the footing that in that case there passed to the party from whom the contri-

(1) (1900) I.L.R., 24 Mad., 85.  
(3) (1930) I.L.R., 52 All., 358.

(2) (1926) 24 A.L.J., 401.  
(4) (1912) 9 A.L.J., 499.

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bution was sought, the benefit of the contract by which the money was to be applied, so that he could say 'I have a contract which frees me from the liability to contribution which the section would otherwise impose upon me'." The case of *Muhammad Abbas v. Muhammad Hamid* (1) was one in which transferees of part of the mortgaged property relied upon an agreement between their transferors and the transferees of another part of the mortgaged property to resist the claim for contribution and were successful in so doing.

I think, therefore, on a review of these authorities that it is not possible to lay down the wide principle which the respondents assert that in no case can a contract not between the mortgagor and the mortgagee affect the provisions of section 82 of the Transfer of Property Act.

The third case of this Court to which I have referred was one in which it was held that there was no contract at all on the subject of contribution between the mortgagors themselves or between the mortgagors and the mortgagee. The case of *Ramabhadrachar v. Srinivasa Ayyangar* (2) was mentioned. The learned Judge said that the defendant would not have been able to resist the claim unless he set up a clear contract, and added that "any such contract would have had to be a contract to which the mortgagee would have assented". In the circumstances of that case, however, it was not necessary to apply any such principle.

It is necessary only to consider the result of the learned District Judge's decision to see that that decision must be incorrect. Mst. Imtiaz Begam and Ziauddin were the persons who received the money advanced by the mortgagee. Mst. Imtiaz Begam, through whom Ziauddin is claiming, paid off the whole of the debt. She was in no worse position afterwards than she had been in before. She had received the money and she had returned it. Fazal Ahmad received no benefit at

(1) (1912) 9 A.L.J., 499.

(2) (1900) I.L.R., 24 Mad., 85.

all from the mortgage, and yet the result now would be that he is to pay to the representative of Mst. Imtiaz Begam, practically as a gift, a proportion of the money which she had paid to the mortgagee.

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From the terms in which section 82 of the Transfer of Property Act is expressed, there is no justification for concluding that "a contract to the contrary" mentioned therein is a contract between the mortgagor and the mortgagee. The term is very general and may refer to any contract. In the majority of cases it would appear that the mortgagee has no interest at all in the question of contribution between the various parts of the property. In so far as he is concerned, he is entitled to proceed against the whole of the property or any part of it to realise the amount due to him. He may be interested if afterwards he acquires the equity of redemption in part of the property but in his capacity as a mortgagee alone he is not interested and therefore there seems to be no reason why he should be a necessary party to any contract which involves the right of contribution between various portions of the property mortgaged. It is unnecessary in this case to consider in what circumstances or in what manner the parties can enter into a contract which will run with the land. The important consideration is that no right or liability to contribution ever arose at all, and that in so far as the mortgagors themselves were concerned, Mst. Imtiaz Begam could never have claimed contribution from Fazal Ahmad. When she died, the mortgage debt had been paid, and there was no mortgage subsisting. She had no charge on any part of the mortgaged property, and it is impossible that any of her heirs should have such a charge. It has been argued that Ziauddin may be precluded from claiming contribution in respect of that part of the property which he inherited directly, but that he is not precluded from claiming in respect of that property which he purchased from his sister's heirs. There is no force in this argument because there

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was no charge in favour of Mst. Imtiaz Begam which Ziauddin's sister could have inherited. I am satisfied that the decision of the learned District Judge cannot be upheld. I would allow the appeal, set aside the decree of the lower appellate court and restore the decree of the court of first instance with costs throughout.

NIAMAT-ULLAH, J.:—I am in entire agreement with the views expressed by my learned brother. I wish to add a few remarks in support of his conclusions.

It is clearly established that Fazal Ahmad was only a surety in the mortgage transaction. As against the mortgagee, however, he and the property hypothecated by him were as liable as Imtiaz Begam and Ziauddin, the principal debtors. Two sets of properties were hypothecated as security for the debt advanced by the mortgagee, Nand Ram. One of them exclusively belonged to Fazal Ahmad, while the other belonged to Imtiaz Begam. Ziauddin had, at the date of the mortgage, no interest in the mortgaged property.

It is not disputed that the mortgagee was at liberty to proceed against the entire mortgaged property, regardless of the fact that Fazal Ahmad had himself borrowed nothing and was made liable only to accommodate his relations, Imtiaz Begam and Ziauddin. Nand Ram actually obtained a decree, on foot of his mortgage, against his three debtors. The decree directed the sale of both the properties. In view, however, of Fazal Ahmad's allegation made in the mortgagee's suit that he was only a surety, the court directed that the property claimed by him be sold only in case the sale of the other property did not satisfy the mortgage money. Fazal Ahmad's property was not sold, as payments made by Imtiaz Begam from the sale of her property satisfied the entire mortgage money then due. All this happened when Imtiaz Begam was alive. If Mst. Imtiaz Begam had no right of contribution against Fazal Ahmad by sale of the latter's property, it is obvious



that her heirs (son, Ziauddin, and a daughter) would not inherit any such right.

I am clearly of opinion that, in the circumstances of the case, Mst. Imtiaz Begam had no right of contribution against Fazal Ahmad, her surety, under section 82 of the Transfer of Property Act, or otherwise. That section merely prescribes the extent to which each of several properties subject to a common charge is liable for the encumbrance. As a general rule, such extent is to be determined with reference to their respective values at the date of the mortgage. It is, however, open to the parties to the mortgage transaction to vary this general rule. In the absence of a contract to the contrary between the mortgagee on one side and the mortgagors owning the several properties mortgaged on the other, the former is entitled to an encumbrance for the whole of what is due to him on every portion of the mortgaged property. The case, however, is different where the mortgagee agrees to split up his charge and hold particular properties liable for particular portions of such charge, regardless of the value of the properties. In such a case the mortgagee is bound by the agreement. Similarly, the owners of two mortgaged properties may contract themselves out of the rule contained in section 82, one agreeing to pay more than the amount proportionate to the value of his property and the other agreeing to pay less than the proportionate value of his property. On payment by one of the mortgagors of the entire encumbrance, he would be entitled to contribution, not in terms of section 82, but in terms of the agreement between him and the co-mortgagor. It is clear to me that to an agreement operating between the co-mortgagors alone the mortgagee is not a necessary party, nor is it open to one of the mortgagors to escape liability under the agreement between him and his co-mortgagor on the ground that the mortgagee was no party to it.

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In the case before us, Fazal Ahmad was only a surety. The entire sum advanced by the mortgagee Nand Ram had been taken by Imtiaz Begam to help her son Ziauddin in his business. The transaction, properly analysed, has a clear implication to the effect that the principal debtors would be liable to pay the debts to the creditor, who is, however, at liberty to proceed both against the principal debtors and the surety. The relationship of the surety and the principal debtor implies the ultimate liability of the principal debtor, though as against the creditor their liabilities are co-extensive. This is perfectly clear from sections 126 and 128 of the Indian Contract Act. Where, in consequence of the liability of the principal debtor and the surety being co-extensive, the surety has had to pay to the creditor, he is at once clothed with the right to recover it from the principal debtor (section 140 of the Indian Contract Act) and the surety is not only entitled to recover the debt personally from the principal debtor but is entitled to the benefit of the security which the creditor had against the principal debtor (section 141 of the Indian Contract Act). Bearing these rules in mind in determining the rights and liabilities of Imtiaz Begam and Fazal Ahmad on the former having paid the entire mortgage money, the equities can work out only in one way. On the claim of the creditor being satisfied by Imtiaz Begam or by sale of her property, her own debt was completely paid up. There was no room for the application of the doctrine of contribution, which presupposes the existence of a debt payable by two persons.

The phrase "in the absence of a contract to the contrary", occurring in section 82 of the Transfer of Property Act, includes an implied agreement between the surety and the principal debtor, and has the same effect as an agreement embodied in a separate deed providing that in case the entire debt is satisfied by sale of the principal debtor's property, the latter will

have no claim against the property hypothecated by the surety as such. Suppose Imtiaz Begam could have instituted a suit against Fazal Ahmad and enforced contribution by sale of his property, Fazal Ahmad would forthwith be entitled to recover the same amount, he having discharged the liability of the principal debtor, Imtiaz Begam. It is obvious that no court would countenance a claim of Imtiaz Begam in face of her own corresponding liability to her surety Fazal Ahmad. The two liabilities cannot co-exist and automatically adjust themselves. In this view, Imtiaz Begam did not, in the first place, acquire any right of contribution against her surety, Fazal Ahmad, and in the second place, if she did theoretically acquire such right, it was forthwith extinguished by the operation of the equity in favour of Fazal Ahmad.

Some complication will be introduced where two persons, owning separate properties, jointly mortgage them to a mortgagee, but contract themselves out of the rule of contribution enacted in section 82 of the Transfer of Property Act, and the interest of one of them in the mortgaged property passes to a transferee. In such a case, the agreement between the mortgagors being personal will not run with the land, and the transferee, at any rate a *bona fide* transferee for value without notice, who is not bound by the personal undertaking of his transferor, cannot be deprived of the right of contribution which attaches to the land transferred to him. The personal agreement of the transferor cannot be successfully enforced against his transferee, who is entitled to all the benefits arising out of his ownership of the land which was subject to a common charge which the transferee has had to discharge. His transferor's agreement foregoing contribution cannot be enforced against the transferee in derogation of his right as the owner of the land under section 82 of the Transfer of Property Act. This position will exist only when the transferee has had to pay the entire

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encumbrance and the personal agreement of his transferor is sought to be enforced against him. The present case is free from a complication of this kind. The original mortgagor Imtiaz Begam, against whom her personal undertaking, implied in the relation of surety and principal debtor between herself and Fazal Ahmad, could be enforced, had herself paid the debt. No third person intervened when the right of contribution is said to have accrued in consequence of payment by her of the entire mortgage money.

*Ramabhadrachar v. Srinivasa Ayyangar* (1) was a case in which the question was whether a personal covenant, in modification of the right of contribution under section 82, was binding on a subsequent transferee, who had to pay the entire mortgage money. That case is easily distinguishable from the present case on the above ground and is no authority for the proposition contended for by the learned advocate for the respondent.

My learned brother has dealt with the other cases cited in arguments. I have nothing to add to his remarks. I concur in allowing the appeal, setting aside the decree of the lower appellate court and restoring that of the court of first instance.

(1) (1900) I.L.R., 24 Mad., 85.

## APPELLATE CIVIL

*Before Mr. Justice Niamat-ullah and Mr. Justice Allsop*

INAYAT KHAN (DEFENDANT) *v.* HARBANS LAL  
(PLAINTIFF)\*

1935  
October, 9

*Civil Procedure Code, order XXIII, rule 3; order XXXIV, rules 4 and 5—Adjustment of suit after the passing of preliminary decree—Suit pending—Adjustment must be given effect to.*

Inasmuch as a preliminary decree for sale does not terminate a mortgage suit, which continues till a final decree has been passed, it is open to the parties, after a preliminary decree has been passed, to enter into a compromise or otherwise agree to an adjustment in respect of the subject-matter of the suit, and the court is bound to give effect to such compromise or adjustment and can not overrule it on the ground that nothing short of payment of the mortgage money as directed by the preliminary decree can prevent the passing of the final decree. Order XXXIV, rules 4 and 5 of the Civil Procedure Code are subject to the provisions contained in order XXIII, rule 3.

Dr. M. Mahmud-ullah and Mr. Mansur Alam, for the appellant.

Mr. Gopi Nath Kunzru, for the respondent.

NIAMAT-ULLAH and ALLSOP, JJ.:—This is an appeal under order XLIII, rule 1(m) of the Code of Civil Procedure from an order passed by the learned Subordinate Judge, Meerut. The plaintiff respondent obtained a preliminary decree for sale in a suit on a mortgage. The mortgagor was directed to pay Rs.12,881-4-0 within six months from the date of the preliminary decree, the 22nd of May, 1930. An appeal from this decree to this Court was dismissed. The mortgagee applied for a final decree under order XXXIV, rule 5 of the Code of Civil Procedure. He alleged that no payment had been made in court, as directed by the preliminary decree. The mortgagor, the appellant before us, objected, by a

\*First Appeal No. 60 of 1934, from an order of P. D. Pande, Subordinate Judge of Meerut, dated the 18th of November, 1933.

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petition, dated the 26th of August, 1933, on the allegation that after the dismissal of the appeal by the High Court a settlement was arrived at between the parties that if Rs.8,000 were paid by the mortgagor immediately and a sum of Rs.4,000 were paid in two instalments by the month of June, 1934, the entire mortgage money would be taken to have been satisfied, and that accordingly the mortgagor paid Rs.8,000 on the 4th of June, 1933, for which a receipt was granted by the mortgagee, and that the mortgagor was ready to pay Rs.2,000, the first of the two instalments above referred to. If this allegation is true, the time fixed for payment of the last instalment had not expired when the mortgagor preferred his objection.

The lower court dismissed the objection without recording a finding as to whether the settlement, alleged by the mortgagor, had in fact taken place. The ground on which the order of the lower court proceeds is that no payment out of court can be recognized by the court passing a final decree under order XXXIV, rule 5, as the preliminary decree, which was drawn up in terms of order XXXIV, rule 4, provides that if the mortgage money is not deposited in court a final decree for sale shall be passed. The contention which found favour with the lower court was that even if the mortgagor paid Rs.8,000, as alleged by him, he could not successfully resist the mortgagee's application for a final decree in respect of the entire mortgage money payable under the preliminary decree. It is argued on behalf of the mortgagor that a mortgage suit does not terminate with the passing of the preliminary decree, and that proceedings in such suit continue till a final decree is passed. Accordingly, it is contended, any adjustment agreed to by the parties can be recorded and must be given effect to under order XXIII, rule 3 of the Code of Civil Procedure.

Whatever may be the correct view on the question whether money paid out of court in satisfaction of the

preliminary decree, wholly or in part, can be recognized by a court when it is moved to pass a final decree—a point on which we express no opinion—it seems to us that the court cannot refuse to act under order XXIII, rule 3 if the conditions required by that rule are fulfilled, so that if a suit had been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court has no option but to order that such agreement, compromise or satisfaction be recorded, and to pass a decree in accordance therewith. This is a necessary corollary of the view taken by this Court that a preliminary decree does not terminate the suit, which continues till a final decree is passed. Once a suit is finally disposed of, order XXIII, rule 3 cannot have any application; but so long as the suit is pending, it is open to the parties to enter into a compromise or otherwise adjust their differences.

Great stress is laid on behalf of the respondent on the imperative language of the preliminary decree that if the amount declared due by the preliminary decree is not paid in court on or before the date fixed for payment, “the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property, or a sufficient part thereof, be sold.” It is argued that the payment not having been made in the manner directed by the preliminary decree, the plaintiff has an absolute right to apply for a final decree being passed. Reference is also made to order XXXIV, rule 5 (3), which provides for the consequences of non-payment in the manner laid down by the preliminary decree, namely that the court “shall pass a final decree directing that the mortgaged property or a sufficient portion thereof be sold”. The provisions contained in this rule should, however, be read with other parts of the Civil Procedure Code, including order XXIII, rule 3, which is equally imperative and gives

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no discretion to the court where an agreement, compromise or satisfaction of the suit wholly or in part has taken place. It may be that where all that is alleged by the defendant in a mortgage suit is payment out of court, which does not necessarily amount to an adjustment of the suit wholly or in part, the court required to pass a final decree may ignore it leaving the mortgagor to pursue his remedy by other appropriate means; but where both parties deliberately agree to a compromise or otherwise agree to an adjustment in respect of the subject-matter of the mortgage suit, the court is bound to give effect to such compromise or agreement. To hold otherwise would be to introduce serious anomalies in the application of law to cases in which preliminary decrees are passed. Such decrees are passed in suits for partition, dissolution of partnership, for accounts, in administration suits and others. We do not think it can be seriously contended that where a preliminary decree is passed directing that a partition shall take place, or that accounts shall be taken between the parties, it is not open to the parties amicably to settle their differences before a final decree is passed. If a mortgagee has agreed with the mortgagor, after the passing of the preliminary decree, that the rights and liabilities of the parties would stand differently from what they are declared to be by the preliminary decree, he is clearly estopped from going behind that arrangement. To take an extreme case, suppose a mortgagee accepts the sale of part of the mortgaged property in lieu of the entire mortgage money, but subsequently repudiates the sale on some ground and applies for a final decree, we do not think that the mortgagor's plea that the whole suit has been adjusted by sale of part of the mortgaged property can be overruled by the court on the ground that nothing short of payment of the mortgage money in court declared due by the preliminary decree can prevent the passing of a final decree for recovery of the amount declared due by the preliminary decree. For these reasons we are of opinion



that order XXXIV, rules 4 and 5 of the Code of Civil Procedure are subject to the provisions contained in order XXIII, rule 3 of the Code of Civil Procedure.

In the case before us, the petition of objection filed by the appellant clearly alleged not a mere payment but an adjustment between the parties. The respondent denied having agreed to the adjustment of the suit alleged by the appellant. The lower court did not inquire into the truth of the appellant's allegation and threw out the objection on a preliminary ground. The appellant's allegation should have been inquired into and given effect to if it was found to be true. In these circumstances we allow the appeal, set aside the order of the lower court and remand the case to that court for disposal according to law as herein indicated. Costs shall abide the result. The court fee paid in this Court shall be refunded.

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### FULL BENCH

*Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr.  
Justice Niamat-ullah and Mr. Justice Bennet*

DISTRICT BOARD, ALLAHABAD (DEFENDANT) v.  
BEHARI LAL (PLAINTIFF)\*

1935  
October, 14

*District Boards Act (Local Act X of 1922), section 192—"Act done or purporting to be done in official capacity"—Refusal to pay a contractor—Suit by contractor for price of materials supplied and work done—Whether six months' limitation applies—U. P. General Clauses Act (Local Act I of 1904), section 4(2).*

A suit brought by a contractor against a District Board for price of materials supplied and work done and for refund of security deposit is not governed by the provisions of section 192 of the District Boards Act, and the rule of six months' limitation does not apply to it.

According to section 4(2) of the U. P. General Clauses Act, 1904, it would appear that the word "act" would include an illegal omission when the word was used with reference to

\*Civil Revision No. 189 of 1934.



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an offence or a civil wrong. It would, therefore, be difficult to hold that the word "act" in section 192 includes all cases of mere omission or refusal on the part of the District Board to perform a private contract, even though they do not amount to an illegal omission within the meaning of section 4(2) of the U. P. General Clauses Act. At the same time the view that section 192 of the District Boards Act has no application to suits in contract would, as indicated by the Privy Council, be wrong.

Mr. *Harnandan Prasad*, for the applicant.

Mr. *A. P. Pandey*, for the opposite party.

SULAIMAN, C.J.:—This is an application in revision by the District Board of Allahabad from a decree of the court of small causes against a contractor who had brought a suit for refund of a deposit made by him as security, for the price of certain *moram* supplied and for payment for certain extra work done. The court of small causes has given to the plaintiff a decree for the first two items but not for the third. The Board at the trial had conceded that it would refund the security money; nevertheless that point also is raised again in revision.

The main question in the case is one of limitation, as to whether the claim was governed by the six months' rule as laid down in section 192 of the District Boards Act, Act X of 1922.

There is no direct authority under this section, but there are several cases under section 326 of the Municipalities Act, Act II of 1916, which has the same phraseology, and there are numerous cases under section 80 of the Code of Civil Procedure which has some similarity, and also one case under section 273 of the Cantonments Act, which also has some analogy.

So far as the corresponding section of the Municipalities Act is concerned, there are certainly at least two cases which can be said to support the applicant's view that the shorter period of limitation is applicable. There were several cases in Madras, Bombay and Calcutta which had suggested the contrary view of the corresponding sections in their Local Acts. But in *Abdul*

*Wahid v. The Municipal Board* (1) a suit had been brought for the return of security as well as for compensation for work done under certain contracts entered into with the Board. The Bench came to the conclusion that the refusal by the Board was on account of a certain resolution passed by the Board at its meeting and that was clearly an act done by the Board in its official capacity and therefore the refusal to pay the amount under that resolution necessitated the institution of a suit within six months from the date of such refusal.

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A learned single Judge of this Court in *Banwari Lal v. Municipal Board of Cawnpore* (2) of course followed this decision in a case where the claim was brought by an employee of the Municipal Board for recovery of certain arrears of pay to which he had been entitled. The learned Judge held that subsequent demands made by the plaintiff and refusals by the Board did not give the plaintiff any fresh cause of action and that limitation began to run when the Board decided adversely to the plaintiff. These two cases no doubt can be cited in support of the view that the shorter period as prescribed by section 192 of the District Boards Act should be applied.

In the case of *Jagannath Bhagwandas v. Municipal Board of Allahabad* (3) a suit had been brought for the refund of certain duty paid on imported goods, which the plaintiff alleged was not payable. It was really not a suit brought on the basis of any private contract entered into between the plaintiff and the Municipal Board, but on the ground that the Board in disregard of its statutory duty to charge the proper amount had realised an excess amount and had declined to refund the excess. The case is therefore distinguishable from the case before us. In that case the learned Judges no doubt applied the provisions of section 326 of the Municipalities Act

(1) (1923) 21 A.L.J., 161.

(2) (1924) 23 A.L.J., 23.

(3) (1927) 25 A.L.J., 1038.

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and held that the claim was governed by the six months' rule.

Similarly in the case of *Munir Khan v. Municipal Board of Allahabad* (1) section 326 was applied to a suit which was brought by a conservancy contractor for remuneration for the work done in removing rubbish from certain parts and depositing the same in the trenching ground. The point that was argued at the Bar was that section 326 of the Municipalities Act was applicable to cases of tort only and not to cases of contract. The learned Judges came to the conclusion that the words "cause of action" were of sufficient amplitude to cover cases involving the infraction of an absolute right or of a right arising out of a contract and also of a right to compensation flowing from tort. It does not appear to have been argued before the Bench that even if the section applied to breaches of contract, the refusal to pay the amount due to the plaintiff was not "an act" within the meaning of that section. This aspect of the case was therefore neither pressed before nor considered by the Bench.

On the other hand in the case of *Municipal Board, Agra v. Ram Kishan* (2) there had been a contract between the plaintiff and the Municipal Board to execute certain works and the suit was brought for recovery of money due to the plaintiff in executing the works. The learned Judges came to the conclusion that section 326 of the Municipalities Act would have no application to such a suit. In the course of the judgment they assumed, for the sake of argument, the contention put forward on behalf of the Board that an act may include an omission and that in the present case the omission to pay might be included in the term "act", but considered that the suit would not come under section 326 inasmuch as the suit was not in tort but it was a suit in contract and that a suit in contract was not one contemplated by section 326.

(1) [1930] A.L.J., 461.

(2) (1933) I.L.R., 55 All., 1002.

The learned Judges had presumably in mind cases of *quasi* contract, the performance of which may be a statutory obligation.

In another case decided by a Bench of this Court, arising under section 273 of the Cantonments Act, *Cantonment Board, Allahabad v. Hazarilal Gangaprasad* (1), it was held that that section would not be applicable to suits brought for recovery of amounts due to the plaintiff from the Board under a private contract. In that case certain materials had been supplied to the Board by the plaintiff, and the claim was for recovery of their value. It was held by the Bench that the claim could not be considered to be "in respect of any act done, or purporting to have been done, in pursuance of this Act or of any rule or bye-law made thereunder". It was remarked that the cause of action for such a suit was not the action of the Board in omitting to pay the price of the goods settled, but would ordinarily arise from the fact that the goods had been supplied by the plaintiff to the Board. The language of section 273 is, however, slightly different from that of section 192 and is similar to the language used in the Public Authorities Protection Act, 1893.

But subsequent to all these cases there has been a recent pronouncement of their Lordships of the Privy Council in *Rebati Mohan Das v. Jateendra Mohan Ghosh* (2) in a suit in which the question of the applicability of section 80 of the Code of Civil Procedure arose. The words in the section are, "against a public officer in respect of any act purporting to be done by such public officer in his official capacity". These words are almost identical with the words in section 192, the interpretation of which we have to consider. In that case the former manager, who was assumed to be a public officer, had executed a mortgage deed creating a charge on certain property of the ward but had not of

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(1) (1934) I.L.R., 56 All., 885.

(2) (1934) I.L.R., 61 Cal., 470.

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course undertaken any personal liability to pay the mortgage money. When a suit was brought against the next manager on the deed, a plea was taken that the suit was defective inasmuch as notice under section 80 of the Code of Civil Procedure had not been given. Their Lordships of the Privy Council first repelled the contention that the mere execution of the mortgage deed brought the case within the purview of section 80. Dealing with the second contention whether the failure to pay off the mortgage satisfied the condition of the section, their Lordships remarked that they were unable to hold that non-payment by the manager was an act purporting to be done by the manager in his official capacity. Their Lordships first pointed out that under the general definitions contained in section 3 of the General Clauses Act, 1897, an "act" might include an illegal omission, "but there clearly was no illegal omission in the present case." Their Lordships then remarked: "It is also difficult to see how mere omission to pay either interest or principal could be an act *purporting to be done* by the manager in his official capacity." Their Lordships then went on to emphasise that the mortgage had imposed no personal liability on the manager, but had merely given an option to pay and therefore the failure to exercise the option was in no sense a breach of duty. With reference to the view expressed by the trial court that the section had no application to suits in contract, which dictum had been repelled by the High Court, their Lordships observed that having regard to the decision of the Board in *Bhagchand Dagadusa v. Secretary of State for India* (1), their Lordships thought that no such distinction was possible. Their Lordships made it clear that they did not mean to suggest that a claim based on a breach of contract by a public officer may not be sufficient to entitle him to notice under the section, but they were unable to agree with the High Court that

(1) (1927) I.L.R., 51 Bom., 725.

the omission to pay the mortgage was such a breach and made the suit as one based on a breach of contract, which would be an act within the contemplation of the section. It seems to me that although section 80 forms part of another enactment, the similarity of the language used in the section makes this authoritative ruling almost directly applicable to the case before us. The claim brought by the other contracting party to recover amounts due to him on such a private contract with the Board would in my opinion not be governed by the provisions of section 192 at all. It would be an ordinary suit governed by the provisions of the Indian Limitation Act under the particular article which may be applicable to the facts of the particular case. The opinion expressed by their Lordships of the Privy Council in the last mentioned case therefore throws considerable light on the interpretation which ought to be put on the section, and in view of that expression of opinion it must be held that section 192 was not intended to apply to cases of this kind. It may also be pointed out that their Lordships of the Privy Council took care to point out that the failure to pay off the mortgage in that case was not "an illegal omission" within the meaning of the word "act" in section 3 of the General Clauses Act of 1897. The corresponding section of the U. P. General Clauses Act (Act I of 1904) is section 4(2) which reproduces those words and lays down that the word "act" used with reference to an offence or a civil wrong shall include a series of acts, and words which refer to acts done extend also to illegal omissions. Therefore under this provision the word "act" would include an illegal omission when the word is used with reference to an offence or a civil wrong. Now damages for breach of contract are based on contractual liability, whereas claims based on tort are based on wrongful action of the defendant and an infringement of the plaintiff's right. There may therefore be considerable difficulty in holding that the word "act" in section 192 of the District Boards

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Act includes all cases of mere omission to perform a private contract, even though not amounting to an illegal omission within the meaning of section 4 of the U. P. General Clauses Act.

*Sulaiman,*  
C.J.

I do not consider it necessary to refer to the English cases under the Public Authorities Protection Act of 1893, though it may be observed that it appears to have been generally held in England that private contracts entered into by public authorities would not be "acts done in pursuance or execution of any Act of Parliament or of any public duty or authority", etc. I would therefore hold that the present claim was not barred by the six months' rule of limitation, but was governed by the ordinary three years' rule.

NIAMAT-ULLAH, J.:—I agree.

BENNET, J.:—I agree.

#### APPELLATE CIVIL

1935  
October, 15

*Before Mr. Justice Thom and Mr. Justice Smith*  
SECRETARY OF STATE FOR INDIA (DEFENDANT) v.  
SHEOBHAGWAN CHIRANJILAL (PLAINTIFF)\*

*Railways Act (IX of 1890), sections 47, 72—General Rules of Indian railways, rules 19, 27—Ultra vires—Contract Act (IX of 1872), sections 149, 151—"Delivery" to bailee—Liability of railway for goods accepted and allowed to remain by authorised railway servant, though no receipt granted or forwarding note received—Negligence—Sparks from engine setting fire to goods in shed—Absence of fire extinguishing appliances.*

A consignment of bales of hemp was taken to a railway station and tendered for despatch to another station. It appeared that no wagon was immediately available for the purpose; so the consignment was, with the consent and permission of an authorised servant of the railway, deposited in the railway goods shed and allowed to remain there, pending

\*Second Appeal No. 699 of 1932, from a decree of Mathura Prasad, Additional Subordinate Judge of Benares, dated the 21st of March, 1932, confirming a decree of Bind Basni Prasad, Munsif of Haveli, dated the 23rd of May, 1931.



arrival of a suitable wagon. No forwarding note was tendered by the consignor, and no receipt was granted to him by the railway. The next day a part of the consignment which was lying in the goods shed was destroyed by fire caused by sparks from an engine alighting on the hemp.

*Held* that, in the circumstances, the goods had been delivered to the railway within the meaning of section 149 of the Contract Act and the railway had become a bailee in respect thereof, although neither a receipt had been given nor a forwarding note tendered. Under section 72 of the Railways Act the liability of a railway is that of a bailee in respect of goods delivered to it for transportation; and any rule, made by the railway under section 47 of the Act, by which the railway attempts to escape that liability is a rule which is inconsistent with the Railways Act itself and is therefore *ultra vires*. Rules 19 and 27 of the Indian Railways General Rules, which purport to provide that in no circumstances will the railway be liable for loss of goods unless the formalities of a forwarding note and a receipt have been complied with, are therefore *ultra vires*. Where goods intended for despatch have in fact been delivered to and accepted by the railway, the mere non-compliance with these regulations will not affect the liability of the railway.

There is no distinction in principle between the case of failure to grant a receipt and the case of failure to tender a forwarding note.

*Held*, also, that the facts that the hemp was stored within 30 or 40 feet of the running line, that no shield was provided to prevent sparks from passing engines alighting on combustible materials stored in the shed, and that the railway provided no adequate arrangements or appliances for putting out fires in the shed, although such fires had occurred before, proved that the railway was grossly negligent in failing to make adequate and reasonable provision for the protection of the goods and was therefore liable for the loss.

Mr. Muhammad Ismail (Government Advocate), for the appellant.

Sir Tej Bahadur Sapru and Mr. S. C. Das, for the respondent.

THOM and SMITH, JJ.:—This is a defendant's appeal arising out of a suit in which the plaintiffs seek to recover the sum of Rs.3,752-5-9 in respect of goods which they

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allege belonged to them and which were destroyed by fire whilst under the custody of the defendant on the 1st of February, 1929.

The main facts of the dispute between the parties are really not in dispute and may be very briefly stated.

On the 31st of January, 1929, the plaintiffs' servant took 465 bales of hemp belonging to the plaintiffs to the railway station at Sheopur near Benares. The bales were intended for despatch to Calcutta. No wagon was immediately available to receive the bales, which were accordingly left overnight in the shed belonging to the railway in close proximity to their running line. The following day part of the consignment of bales was destroyed by fire. The plaintiffs allege that sparks from a passing engine of a goods train alighted on the bales and set fire to them.

The plaintiffs claim that they are entitled to recover from the railway company the value of the hemp which has been destroyed, inasmuch as the fire resulted from their carelessness.

The railway company deny that the bales caught fire as a result of sparks alighting upon them from a passing engine. This point, however, is not now open to argument. The lower appellate court has found that sparks from a passing engine set fire to the bales in question. That is a finding of fact which cannot be challenged in second appeal.

In paragraph 7 of the plaint the plaintiffs set out the grounds upon which they claim that the railway company are liable to make good the loss resulting from the fire. They say the said fire was due to the negligence of defendant No. 1, the railway company. Amongst the various acts of negligence the plaintiffs aver that "the engine of the said goods train was defective and the coal supplied to the said engine was also of inferior quality and the said train was being driven negligently and in violation of the rules and practice obtaining on the

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railway, the staff at Sheopur station was negligent and inadequate in extinguishing the fire and the defendant has negligently suffered Sheopur station to remain without any fire extinguishing appliances or without any protection at all. But for the negligence of the defendant No. 1 as in the premises hereinbefore disclosed the said fire could not have taken place and, at any rate, could have been extinguished before any injury could be caused." It will be observed that the plaintiffs charged the defendant with negligence in three respects: (1) The engine and the fuel were defective and the engine was being driven negligently. (2) The railway company had failed to take adequate steps for the protection of goods lying in their shed at Sheopur station. (3) They had failed to provide the necessary fire extinguishing appliances which ordinary care dictated should have been provided in a shed containing combustible material in close proximity to a railway line.

Upon a consideration of the evidence the learned Subordinate Judge has found that the railway company was guilty of negligence in two respects, viz., (1) It failed to provide the necessary protection of the hemp which was consigned by the plaintiffs, and (2) It failed to make reasonable provision for the extinguishing of fire in its premises. The learned Judge accordingly held that the loss suffered by the plaintiffs was the result of the defendant's negligence, and he has awarded the sum of Rs.2,099-13-10 to the plaintiffs. The learned Munsif and the learned Subordinate Judge refused to award the full sum sued for inasmuch as it was proved that a certain portion of the consignment of bales of hemp was salvaged by the plaintiffs themselves. The plaintiffs preferred a cross-objection in the court of the learned Subordinate Judge in which they claimed that they were entitled to the full amount sued for. This cross-objection was dismissed, and no appeal has been preferred against its dismissal.

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The learned Government Advocate on behalf of the railway company has contended that the railway company are not liable for the destruction of the bales in question because the plaintiffs failed to observe certain formalities which are prescribed by the railway company in their regulations which are published in virtue of powers granted to the railway companies under section 47 of the Railways Act. He has urged that no delivery can be held to have taken place of the plaintiffs' bales since no forwarding note was tendered to the railway company when the bales were brought to the station, and no receipt therefor was granted by the railway company. He has referred in this connection to rules 19 and 27 of the Indian Railways General Classification of Goods and General Rules. Rule 19 prescribes that a forwarding note in which the description and the destination of the goods are set out must be tendered by the consignor, and rule 27 is to the effect that the railway company will not be liable for loss unless the goods are booked in the ordinary manner laid down by the railway company and a receipt given therefor. The learned Government Advocate has further contended that in any event, since the learned Subordinate Judge has not found that the plaintiffs have established the case which they have set out in their plaint, they are not entitled to a decree for the sum sued for or any part thereof.

We shall consider, in the first instance, the argument for the appellant that the railway company cannot be liable in view of the fact that the goods were not accompanied by a forwarding note at the time they were left at the Sheopur railway station on the 31st of January, 1929.

There is little doubt as to what did happen when the goods were taken to the Sheopur station on that day. From the judgment of the learned Munsif we find that according to the plaintiffs' witness Ram Sumer, the station master was informed that the plaintiffs had 465

bales of hemp which they wished to despatch to Howrah. The witness made a request for the provision of wagons for the accommodation of these bales. The station master promised to provide the wagons, and asked Ram Sumer to bring along to the station the consignment of bales. These bales were brought along and stacked on the railway premises.

The defendant company, on the other hand, alleged that Ram Sumer did not obtain the permission of the station master or any railway official before bringing the bales to the station. They stated that he brought the bales to the station and stacked them in the goods shed after informing the goods clerk.

As the learned Munsif points out in the course of his judgment, there is little material difference between the two versions given by the plaintiffs on the one hand and the defendant on the other. What is perfectly clear is that with the knowledge and consent of the railway company the goods were brought to the station and stored in the goods shed pending the arrival of the wagons which were to convey them to Howrah.

Now, if at the time when the goods were stored by the plaintiffs in the defendant's goods shed a receipt had been taken therefor and a forwarding note granted by the plaintiffs, there could have been no question at all of the defendant's liability in respect of the destruction of a portion of these bales whilst they were in the defendant's goods shed. Learned counsel for the appellant, however, has contended that in law delivery of the bales to the railway company had not been effected, and that therefore the railway company had not become a bailee in respect of the goods and so liable under section 151 of the Contract Act. Provision is made in the Railways Act that the railway company becomes a bailee and is liable as such in respect of goods entrusted to its care for transportation.

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Although the goods had been deposited in the defendant's goods shed, as already observed, with the knowledge and consent of the defendant company and allowed to remain there, learned counsel has contended that the railway company cannot be held liable in respect of the destruction of these goods because the plaintiffs failed to comply with the rules and regulations of the railway company under which rules and regulations the railway company agrees to do business with the public. The particular omission upon which the learned Government Advocate found was the omission upon depositing the goods in the railway company's goods shed to tender a forwarding note as prescribed by rule 19 already referred to.

In support of his contention that since this rule had not been complied with the railway company could not be held liable for any loss due to destruction of the goods while they were in the goods shed, the learned Government Advocate referred to the decision in the case of *Banna Mal v. Secretary of State for India* (1). In that case the proposition was approved that a rule by which a railway company disclaimed all responsibility for goods left on the company's premises unless certain conditions were fulfilled, the principal of which was that the goods should have been accepted and a receipt given for them by a duly authorised employee of the company, was a rule properly made under the provisions of the Indian Railways Act of 1890, and that no suit in respect of the loss of goods merely deposited upon the company's premises without such a receipt being taken for them could be maintained.

If such proposition is sound law, then clearly the plaintiffs are not entitled to recover anything in the present suit. On general principle we do not agree with the proposition of law enunciated by the learned Judges in that case. Railway companies, like all statutory bodies.

(1) (1901) I.L.R., 23 All., 367.

have certain rights, privileges and liabilities. Some of these liabilities are imposed by common law, others by statute. So far as the defendants in this case are concerned, their liabilities are mainly statutory. Now it appears to us that a railway company is not entitled by the mere issue of rules and regulations to escape a statutory liability unless the legislature has sanctioned such a procedure. Under the Railways Act, in respect of all goods delivered to it for purposes of transportation the railway company's liability is that of a bailee. It appears to us that the rule by which a railway company attempts to escape that liability is a rule which is inconsistent with the Railways Act itself, and therefore *ultra vires*.

There is no doubt that the railway company under statutory authority has very wide powers in respect of the framing and publication of rules and regulations under which it contracts as a common carrier to do business with the public. Such rules and regulations, in the very nature of things in the case of a railway company, are necessary for the efficient and smooth working of its organisation and the expeditious despatch of its business. But in framing these rules the railway company must have regard to the very clear provisions in the statute as to its liability in respect of goods consigned to its care for transportation. Upon general principle, therefore, we do not agree with the decision in the case referred to above.

Apart from general principle, however, there is a very clear authority in support of the argument which has been preferred by learned counsel for the respondents that the railway company's liability as a bailee remains unrestricted by the publication of the rules already referred to.

The point at issue came up for consideration in a case reported in *Sohan Pal, Munna Lal v. East Indian Railway Company* (1). In that case the principle was

(1) (1921) I.L.R., 44 All., 218.

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approved that where goods are tendered to an appropriate official of a railway company for despatch to a particular destination and are accepted by him, the liability of the company in respect of such goods accrues from the time when the goods are so accepted, and is not dependent upon the granting or withholding of a receipt for the same on behalf of the company by the official who has accepted the goods.

The case came before a single Judge in the first instance, and was referred by him to a Bench. The Bench regarded the question as one of importance, and referred it to a Full Bench for decision. The learned Judge who referred the case in the first instance considered the decision in *Banna Mal v. Secretary of State for India* (1) mentioned above and several other decisions of the Bombay High Court and the Calcutta High Court on the same question. He states: "In my opinion the rulings of the Bombay High Court and the Calcutta High Court seem to be correct and the decision in *Banna Mal v. Secretary of State for India* (1) to be incorrect." The referring Judge, therefore, refused to follow the decision in *Banna Mal v. Secretary of State for India* (1).

In his judgment in the case when it came before a Full Bench, WALSH, J., stated: "Lastly, I would merely add that really the case in *Banna Mal v. Secretary of State for India* (1) does not govern the case even if it were rightly decided. In my view it was wrongly decided."

A number of other decisions were referred to by learned counsel for the respondents which he claimed destroyed the authority of the decision in *Banna Mal's* case (1). He referred, for example, to the case of *Moolji Sicka and Co. v. Bengal Nagpur Railway* (2) and the case of *Jalim Singh Kotary v. Secretary of State for India* (3).

(1) (1901) I.L.R., 23 All., 367.

(2) (1931) 35 C.W.N., 1242.

(3) (1904) I.L.R., 31 Cal., 951.



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In the case last mentioned it was held that rules framed by the railway company under sections 47 and 54 of the Railways Act, whereby goods were to stand at owner's risk and the railway company were not to be liable therefor until a receipt had been granted by them, were inconsistent with the Act and unreasonable, and that the railway company were liable to pay compensation for the loss incurred. In the course of his judgment in this case STEPHEN, J., considers the effect of non-compliance with the rules of the railway company in respect of the delivery of goods to the railway company for transportation. He proceeds: "It is argued that there was no delivery in this case because, under the circumstances stated, delivery does not take place until a receipt is given by the railway company. I cannot read this section in that way. Delivery I take to be a purely lay word, devoid of any legal significance at all; it alludes to a physical event; I do not think one can say that whether there is delivery or not is in any way affected by any legal event. Therefore I take delivery in that section to refer to a physical event, an important element of which is that whatever is delivered passes from the physical custody of one man to the physical custody of another."

We are not called upon in this case to decide whether this statement of the law by the learned Judge, which is very wide and sweeping, can without qualification be regarded as sound. We have no doubt, however, that in the present case, where goods have been brought by a consignor to a railway station to be transported by the railway company, delivery is a physical event, and delivery is completed when the goods are not refused by the railway company and allowed to be placed in their premises.

Learned counsel for the respondents referred also to the decision in another case, *Munna Lal v. East Indian Railway Company* (1). In that case it was decided that

(1) A.I.R.. 1922 All., 71.



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where the station master never definitely told the plaintiff in unmistakeable terms that the goods were being kept on the railway premises at his own risk, and also never definitely accepted the goods at railway's risk, his conduct in retaining the goods in the railway shed afforded evidence that he accepted the bailment of the goods on behalf of the railway company; section 72 of the Railways Act came into operation, and the railway company was responsible for their safe custody.

In view of the general considerations to which we have referred above, and of the decisions cited in our judgment, the decision in *Banna Mal v. Secretary of State for India* (1) can no longer be regarded as sound law.

The learned Government Advocate drew a distinction between the non-furnishing of a forwarding note by the consignor who brings his goods to the railway station, and the failure of the railway company to issue a receipt. In view of the law as it has been laid down in the cases referred to above, the learned Government Advocate was constrained to admit that so far as the failure to furnish a receipt was concerned, that could not be made a ground for exempting a railway company from liability in respect of the destruction of goods consigned to its care. He contended, however, that the failure to furnish a forwarding note stood on an entirely different footing; that there was a difference in principle between the cases of the failure to grant a receipt, and failure to tender a forwarding note. We have considered this argument, in support of which the learned Government Advocate was unable to produce any authority beyond an inference from the decision in the case of *Banna Mal v. Secretary of State for India* (1). In our view there is no such distinction in principle. The important point is, Were the goods accepted by the railway company? Was physical delivery effected, by which the railway company agreed that the goods should be placed on its premises

(1) (1901) I.L.R., 23 All., 367.

pending the arrival of wagons for their accommodation? Now, in the present case, in our judgment, there can be no doubt as to what was effected, whether the consignor's servant went to the station master and took his permission in the first instance before the bales were brought to the station or not. There is no doubt that with the consent of the railway company's servant these goods were brought to the station, and they were deposited in the railway goods shed and allowed to remain there. The defendants in their written statement alleged that there was a practice on the part of consignors, in order to secure priority in obtaining wagons, to bring goods inside the premises of a railway station and stack them there, and to appoint a watchman to look after them; and that in these cases the railway company was not regarded as responsible for their safe custody. The evidence upon this point has been considered by the learned Subordinate Judge, and he has held that the railway company has failed to substantiate the averment.

In the result, in this branch of the case we hold that the 465 bales of hemp were tendered by the plaintiffs to the defendant's servant at Sheopur station on the 31st of January, 1929, that they were with the consent of the railway company's servant placed in the railway company's goods shed near the running line, and that therefore the goods were delivered by the plaintiffs to the railway company within the meaning of section 148 of the Contract Act. It follows that in respect of these goods the railway company's liability is that of a bailee, and if the goods, or a portion thereof, have been destroyed because the railway company failed to take as much care of these goods as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value, the railway company are liable for any loss sustained by the plaintiffs.

This brings us to a consideration of the question of negligence. We have above referred to the grounds of negligence alleged by the plaintiffs in their plaint.

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Certain evidence was led with a view to establishing the averment that the railway company were guilty of negligence in respect of the engine which they used, and the fuel which was being consumed by it. The courts below, however, have not decided the case upon this averment. They have held that the railway company has been negligent because it failed to provide reasonable protection for the bales of goods, which were admittedly combustible, and which were deposited close to the running line, and because it failed to make reasonable provision for the extinguishing of fire in its goods shed.

Now, as we have remarked, the finding that the bales of hemp were set on fire by a spark or sparks from a passing engine must be accepted in second appeal. Learned counsel for the appellant, however, has contended that the courts below have made an entirely new case for the plaintiffs, and have not given a decision upon the case as set out by the plaintiffs in their pleadings. Certainly the learned Subordinate Judge has not held that the railway company were using inferior coal, or that the engine from which the sparks came was defective in any way, or was being driven carelessly, but he has held in clear and specific terms that the railway company had failed to show that there were proper arrangements to save the hemp from fire. In the course of his judgment the learned Subordinate Judge points out that fires had occurred in the railway company's premises prior to the destruction of the plaintiffs' bales of hemp. Whether evidence was led to support such a finding is not clear, but it is common knowledge, and it must be presumed that railway companies know, that fires are frequently caused by sparks from engines, and goods lying in close proximity to the running line are often destroyed by fire. The learned Subordinate Judge has stated his opinion, with which we are in complete agreement, that it was the duty of the railway company to protect the goods which had been consigned to its care from fire or sparks. He has found that the railway company had

failed in this duty, and had failed further to make ordinary provision for the expeditious extinguishing of any fire that might break out in the goods shed.

Whether the railway company has been negligent in that it had not made reasonable provision for the protection of the plaintiffs' bales of hemp, or for the extinguishing of any fire that might occur on its premises, is really a "jury question". The hemp was stored within 30 or 40 feet of the running line, no shield was provided to prevent the sparks from passing engines alighting on combustible materials stored in the shed, and so far as appliances for extinguishing fires are concerned, all that seems to have been provided was half a dozen iron water-buckets, which were empty at the time when the plaintiffs' bales caught fire. In these circumstances we have no hesitation in concluding that the railway company was grossly negligent in failing to make adequate and reasonable provision for the protection of the goods which had been delivered to it by the plaintiffs and accepted by them for transportation to Calcutta. The railway company in the circumstances are liable as bailees under section 151 of the Contract Act.

In the result the appeal is dismissed with costs.

### REVISIONAL CRIMINAL

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and  
Mr. Justice Bennet*

EMPEROR v. MASURIA\*

*Criminal Procedure Code, sections 118, 120, 426, 498—Security for good behaviour—Imprisonment for failure to furnish security—Release on bail pending appeal—Power to admit to bail—Time of such release to be excluded from the period of the order requiring security and directing imprisonment in default.*

A person who has been ordered to furnish security to be of good behaviour for one year, and on failure to do so has been

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\*Criminal Revision No. 629 of 1935, by the Local Government from an order of T. N. Mulla, Sessions Judge of Allahabad, dated the 8th of April, 1935.

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committed to prison, can, on appeal under section 406 of the Criminal Procedure Code to the Sessions Judge, be ordered by him to be released on bail pending the appeal, in exercise of the powers conferred on him by section 498 of the Code. Section 426 can not apply to such a case, as it applies only where an appeal by a person convicted of an offence is pending. But section 498 confers very wide powers to admit to bail any person who is detained in jail, no matter whether he is a convicted person or not, and no matter whether he has appealed from a conviction for an offence or has preferred any other appeal allowed by the Code, and even where there is no appeal pending.

The time during which such a person remains out on bail by order of the Sessions Judge is, if his appeal is ultimately dismissed and he surrenders to his bail, to be excluded, on the analogy of the release on bail of persons convicted of offences, from the term prescribed under the order of the Magistrate who bound him over. During that time he has neither furnished the security which was ordered nor been detained in jail in default as directed by the order; it can not therefore be said that during that period the order of the Magistrate has been carried out and has therefore partially exhausted itself. It is noteworthy that section 120(2) of the Criminal Procedure Code merely fixes the date of the commencement of the term of imprisonment, and does not deal with cases where the term has been interrupted by a subsequent order made by an appellate or revisional court.

The Government Advocate (*Mr. Muhammad Ismaïl* for the Crown.

The opposite party was not represented.

SULAIMAN, C.J., and BENNET, J.:—This is an application in revision by Government from the order of the Sessions Judge of Allahabad admitting the opposite party to bail, who had been bound over under section 118 of the Code of Criminal Procedure for a period of one year to be of good behaviour, and ordered to undergo imprisonment unless he furnished two reliable sureties.

Two questions are raised in this revision. The first is that the Sessions Judge had no jurisdiction to admit Masuria to bail at all; and the second is that the period

during which Masuria would remain on bail should be excluded from the period of one year for which he has been bound over, if his appeal be dismissed ultimately.

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As regards the first point it was held by a learned Judge of this Court in *Emperor v. Katwaru Rai* (1) that the words "convicted person" in section 426(1) of the Code of Criminal Procedure include persons against whom an order has been passed by a criminal court from which there is an appeal allowed, and accordingly persons bound over under section 107 of the Code of Criminal Procedure to keep the peace and ordered to find security, while appealing to the sessions court, could apply under section 426(1) to be released, and that even if section 426(1) did not apply, the order could be passed under section 423(1)(d). It was further pointed out by one of us in the later case of *Emperor v. Darsu* (2) that a person imprisoned under section 123 of the Code of Criminal Procedure is not strictly speaking a convicted person and that section 426 could therefore be applied by analogy only and that the Sessions Judge would have power under section 498 to release such a person on bail.

The scheme of the Criminal Procedure Code is that part IV deals with "Prevention of offences" and security that has to be taken for keeping the peace and for being of good behaviour. The persons brought before the court are not accused persons who are charged with any offence, as they have up to that time committed no offence at all. On the contrary part VI deals with "Proceedings in prosecutions" of accused persons who are alleged to have committed certain offences and they have either to be convicted, acquitted or discharged. It seems to us that persons against whom proceedings are taken under chapter VIII are not accused persons, nor can they be called convicted persons when an order is passed against them adversely. That such a distinction exists is shown by the circumstance that separate provisions for appeals

(1) (1932) I.L.R., 54 All., 861.

(2) (1934) I.L.R., 57 All., 264.



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are made in part VII. Section 406 allows appeals to a person who has been ordered under section 118 to give security, section 406A to a person aggrieved by an order refusing to accept or rejecting a surety, while section 407 and the following sections allow appeals to persons convicted of offences. The word "convicted" has been used in the Code as meaning "convicted of an offence", and would therefore be inapplicable to the case of persons who are bound over.

There is accordingly difficulty in applying section 426 to such a case. Under that section where an appeal by a "convicted person" is pending, the appellate court may order the execution of the sentence or order to be suspended or the person released on bail or on his own bond. That section applies to all criminal courts and would be applicable where there is an appeal by a convicted person. It would not apply to a person who has been bound over and who has preferred an appeal under section 406 of the Code of Criminal Procedure. On the other hand section 498 which applies to courts of session and the High Court is more general in its scope and empowers such court "in any case, whether there be an appeal on conviction or not", to direct that any person be admitted to bail. The words "in any case" are very comprehensive and would certainly apply to a case where a person has been bound over. The words "whether there be an appeal on conviction or not" are again of very general scope and would cover such a case. The legislature has obviously intended to confer upon the High Court and a court of session very wide powers to admit to bail any person who is detained in jail, no matter whether he is a convicted person or not, and no matter whether he has appealed from a conviction for an offence or has preferred any other appeal allowed by the Code, and even where there is no appeal pending. There is no reason for limiting the scope of the section so as to narrow it down to cases where persons have been convicted of offences and have preferred appeals under section

407 and the following sections. We must, therefore, hold that the learned Sessions Judge had power under section 498 to admit Masuria to bail. But that section of course did not empower him to pass an order under section 426 suspending the execution of the order.

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The second question is somewhat difficult. In the case of *Emperor v. Darsu* (1) it was distinctly laid down that quite apart from the provisions of section 426, the general principles of criminal law required that the period during which the applicant was released on bail must be excluded from the period of one year for which he was required to undergo imprisonment failing the giving of security. It was there pointed out that a contrary view would create the anomaly that "in every case in which a person ordered to be imprisoned under section 123 made an appeal, then the period during which he was released on bail would always reduce the period for which he was to be imprisoned". It is noteworthy that section 112 merely fixes a "term" for which the order is to be enforced; that is to say, it fixes a period of time during which the accused must either furnish security or failing such security be detained in prison. It does not necessarily mean that the order should be operative from one particular date till another particular date, no matter whether the accused has been released by an order of an appellate court in the meantime. Similarly section 120(2) merely lays down that the period shall commence on the date of such order unless the Magistrate for special reasons fixes a later date. That merely fixes the commencement of the term and does not deal with cases where the term has been interrupted by a subsequent order made by an appellate court or a revisional court.

There are several classes of cases where a person can be detained in custody although he has not been convicted of an offence, vide section 217(2). In cases where a person has been convicted of an offence

(1) (1934) I.L.R., 57 All., 264.



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and the sessions court on appeal admits him to bail, the court may not necessarily pass a separate order suspending the execution of the sentence or pass an order releasing him on bail under section 426. It may simply pass an order under section 498 admitting him to bail. The necessary result of the release on bail is that the person does not serve out his sentence of imprisonment during the period that he is released on bail. When therefore his appeal is dismissed and he surrenders to his bail, he must serve out the remaining portion of his sentence so as to complete the full period of imprisonment passed against him. It seems to us that the same principle should apply to cases where a person has been bound over for a particular period, is released on bail by the Sessions Judge and has to surrender after the dismissal of his appeal. The necessary result of his being allowed to be at large is that he has for that period neither furnished any security as required by the order of the Magistrate nor been detained in jail, but has been set free by the order of the appellate court. It cannot therefore be said that during this period the order of the Magistrate has been carried out and has therefore partially exhausted itself. We think that on the analogy of the release on bail of persons convicted of offences it must follow that the period during which the person bound over is released on bail by an order of the appellate court should be excluded from the term prescribed under the order of the Magistrate who bound him over.

With these observations we dismiss this application.

#### REVISIONAL CIVIL

*Before Mr. Justice Iqbal Ahmad*

1935  
October, 21

MANNI GIR (PLAINTIFF) v. AMAR JATI AND ANOTHER  
(DEFENDANTS)\*

*Civil Procedure Code, section 52—Legal representative—Decree against assets of deceased debtor in the hands of a legal representative—Other legal representatives, also having*

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\*Civil Revision No. 140 of 1935.

*assets, impleaded after limitation—Suit can not be decreed against them nor the assets in their hands touched—No representative capacity—Limitation Act (IX of 1908), section 22.*

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If several persons are in possession of the assets of a deceased person, then each of them is, to the extent to which he is in possession of such assets, a legal representative of the deceased person; and no one of them represents the entire assets or estate of the deceased person. So, if the creditor sues only one of such persons as a legal representative of the deceased debtor, but not in a representative character as being in law competent to represent all the others or the whole estate, and impleads the others after expiry of the period of limitation, no decree can be passed against the entire assets, or affecting the assets in the hands of the defendants who were impleaded beyond time.

Mr. A. P. Pandey, for the applicant.

Mr. S. N. Verma, for the opposite parties.

IQBAL AHMAD, J.:—This is an application in revision against a decree passed by a court of small causes in a suit brought by the plaintiff for the recovery of a sum of Rs. 306-8-0 on the basis of a promissory note dated the 16th of August, 1931, executed by one Sheo Narain Jati. Sheo Narain died before the institution of the suit and the plaintiff impleaded one Jadu Nandan Jati as the sole defendant in the suit.

It was alleged in the plaint that the loan was taken by Sheo Narain in the capacity of the mahant of a particular math with a view to defray the expenses of the math, and the plaintiff accordingly prayed for a decree declaring his right to realise the amount due to him from the math property. The learned small cause court Judge however held that the allegation that the debt was taken for the purposes of the math was not proved, and, as such, the plaintiff was not entitled to realise the amount due to him from the math property. This decision of the learned Judge is not assailed before me.

Jadu Nandan Jati contested the suit *inter alia* on the ground that two persons named Amar Jati and Itwar Jati were necessary parties to the suit. The two last named

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persons were then added as defendants, but this was done after the expiry of the period of limitation for the recovery of the amount due on the basis of the promissory note.

Amar Jati and Itwar Jati also contested the suit and the learned Judge dismissed the claim as against them on the ground that they were impleaded as defendants after the expiry of the period of limitation. The claim against Jadu Nandan Jati was decreed; but the decree was confined in its operation to the assets, if any, of Sheo Narain in the hands of Jadu Nandan.

The plaintiff being dissatisfied with the decree of the learned small cause court Judge has come up in revision to this Court and it is contended on his behalf that as Jadu Nandan was in possession of some of the assets of Sheo Narain the court below should have passed a decree against all the three defendants, notwithstanding the fact that two of those defendants were impleaded in the suit after the expiry of the period of limitation. The argument is that as the decree passed in the plaintiff's favour for recovery of the debt due from Sheo Narain could only be realised from the assets of Sheo Narain, and as Jadu Nandan was in possession of some of those assets, he must be deemed to have effectively represented the entire assets left by Sheo Narain, and accordingly the plaintiff was entitled to a decree entitling him to realise the decretal amount from the assets of Sheo Narain, irrespective of the fact whether those assets were or were not in possession of Jadu Nandan. In other words it is argued that the suit was in substance a suit for recovery of the money claimed from the assets of Sheo Narain and was not against any defendant in his personal capacity, and as one of the persons in possession of those assets was sued within the period of limitation, an effective decree executable against the entire assets of Sheo Narain could be and ought to have been passed notwithstanding the fact that some of the defendants were brought upon the record after the expiry of the period of limitation. In

support of these contentions reliance has been placed on the decisions in *Muttyjan v. Ahmed Ally* (1), *Khurshet-bibi v. Keso Vinayek* (2), *Virchand Vajikaranshet v. Kondu* (3) and *Davalava v. Bhimaji Dhondo* (4). In my judgment there is no force in the contentions advanced on behalf of the plaintiff applicant

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The decree prayed for by the plaintiff was a simple money decree and the plaintiff's claim could be decreed only against those defendants who were sued before the expiry of the period of limitation. As Amar Jati and Itwar Jati were impleaded as defendants after the period to bring a suit on the basis of a promissory note had expired, no decree could be passed against them. Jadu Nandan was sued as a legal representative of Sheo Narain and not in a representative capacity. The mere fact that Jadu Nandan was impleaded as a defendant within time could not, therefore, warrant the passing of a decree against persons who were not made defendants till the period of limitation for the suit had expired. The plaintiff no doubt was entitled to a simple money decree against the legal representatives of Sheo Narain and to realise that decree from his assets. But if more than one person was in possession of those assets, every one of those persons was, to the extent to which he was in possession of the assets, a legal representative of Sheo Narain. If the plaintiff did not sue some of the legal representatives within the period of limitation, the decree could have no efficacy against them and their possession over the assets could not be disturbed in execution of the decree by which they were not bound. In the case before me the decree no doubt is executable so far as the assets of Sheo Narain in the hands of Jadu Nandan are concerned; but as no decree has been or could be passed against the other two defendants, the assets in their possession cannot be attached and sold in execution of the decree obtained against Jadu Nandan alone.

(1) (1882) I.L.R., 8 Cal., 370.

(2) (1887) I.L.R., 12 Bom., 101.

(3) (1915) I.L.R., 39 Bom., 729.

(4) (1895) I.L.R., 20 Bom., 333.

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The cases relied upon by the learned counsel for the plaintiff applicant are authorities for the proposition that a decree with respect to a debt due from a deceased Muhammadan obtained against only some of his heirs is binding on his other heirs notwithstanding the fact that those other heirs were not impleaded as defendants in the suit. With all respect I am unable to agree with these decisions.

In *Muttyjan v. Ahmed Ally* (1) it was held that when a creditor of a deceased Muhammadan sues the heir in possession, and obtains a decree against the assets of the deceased, the suit is to be looked upon as an administration suit, and those heirs of the deceased who have not been made parties cannot, in the absence of fraud, claim anything but what remains after the debts of the testator have been paid. To the same effect is the decision in *Khurshetbibí v. Keso Vinayek* (2). In these two cases the creditor had obtained a simple money decree against the assets of a deceased Muhammadan only against some of the heirs of the deceased who were in possession of the estate, and the other heirs, who were not in possession, were not impleaded as defendants to the suit.

In *Davalava v. Bhimaji Dhondo* (3) the facts were as follows. One Nur Saheb, a Muhammadan, mortgaged some land to a man named Bhimaji Dhondo. Nur died leaving a widow, a son and two daughters as his heirs. The mortgagee brought a suit against the son "represented by his mother" for possession of the land as owner in pursuance of a certain clause in the mortgage deed and obtained a decree and got possession. Thereafter the daughters brought a suit for redemption of the mortgage, contending that they were not bound by the decree for possession as they were no party to the same. The suit was dismissed and it was held that "When in a mortgage suit the debt is due from the father, and after his death the property is brought to

(1) (1882) I.L.R., 8 Cal., 370.

(2) (1887) I.L.R., 12 Bom., 101.

(3) (1895) I.L.R., 20 Bom., 338.

sale in execution of a decree against the widow or some of the heirs of the mortgagor, and the whole property is sold, then the heirs not brought on the record cannot be permitted to raise the objection that they are not bound by the sale simply because they are not parties to the record. This principle of law applies as much to a Hindu family governed by the Mitakshara law as to a Mahomedan family."

In *Virchand Vajikaranshet v. Kondu* (1) a mortgagee under a simple mortgage brought a suit for sale of the mortgaged property after the death of the mortgagor who was a Muhammadan. The mortgagor had left a widow, a son and two daughters as his heirs. But originally only the son was impleaded as a defendant to the suit. On a plea being raised on behalf of the son that the deceased mortgagor had left other heirs, the widow and the two daughters were also brought upon the record as defendants, but this was done after the period of limitation for the suit had expired. Both the trial court and the first appellate court dismissed the claim for sale of the share of the defendants who were added after the expiry of the period of limitation. But a Division Bench of the Bombay High Court decreed the claim of the plaintiff for the sale of the shares of the subsequently added defendants as well. The learned Judges observed that as the suit was properly brought within the period of limitation to enforce payment of money that was specifically charged on the whole mortgaged property, and the property was liable to be sold in satisfaction of the mortgage in priority to the satisfaction of any interest derived from the mortgagor subsequent to the date of the mortgage, the plaintiff was entitled to a decree for the sale of the whole property "in the hands of any heir of the mortgagor" even though some of the heirs were impleaded as defendants after the expiry of the period of limitation.

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(1) (1915) I.L.R., 39 Bom., 729.



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The decisions quoted above are based on one or other of the following grounds:

(1) Following the analogy of the Hindu law in the case of a Hindu widow, the defendants in the former suit may be considered as having been sued in their representative character only, and therefore the decision binds the whole property left or mortgaged by the deceased even though only some of his heirs were impleaded as defendants within the period of limitation.

(2) All creditors' suits are in the nature of administration suits, and therefore the heir who is sued effectively represents the other heirs who are not parties to the suit or who are made defendants after the expiry of the period of limitation.

(3) On the death of a deceased mortgagor it is only the equity of redemption that is inherited by the heirs, and as the mortgagee has a lien on the property he can enforce that lien over the whole property, even though some of the heirs who have inherited the equity of redemption are not parties to the suit.

I regret that none of the grounds noted above appears to me sound.

The analogy of a decree obtained against a Hindu widow has no application to a decree obtained only against some of the heirs of a deceased Muhammadan. A Hindu widow in possession of her husband's estate represents the entire estate, and therefore a decree obtained against her without collusion or fraud binds the entire reversioners, for the simple reason that during the continuance of her possession the entire estate vests in her. During her lifetime no reversioner is entitled to possession of the estate. She is during her lifetime the owner of the estate, and therefore the decree obtained against her binds the estate. But under the Muhammadan law each heir inherits a separate and defined share in the estate left by a deceased Muhammadan. One heir has no right or interest in the share inherited by another heir and can in no sense be said to represent

the estate that has devolved on the other heirs. The estate left by a Muhammadan at the time of his death vests immediately in each heir in proportion to the shares ordained by Muhammadan law. It follows that the interests of each Muhammadan heir is distinct and separate and the principle of representation can have no application to such a case. The decree obtained against one heir cannot, therefore, be binding on the share inherited by another heir.

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Similarly I am not aware of any principle of law that entitles one of the Muhammadan heirs in possession to stand as a litigant on behalf of all the other heirs, and a suit against only some of the heirs, unless clearly framed as an administration suit, cannot be regarded as such. If one of the heirs takes possession of all the properties left by the deceased, his possession *qua* the shares of the other heirs must be in the capacity of a trespasser, and a decree obtained against a trespasser cannot be binding on the true owner. If a creditor wants to enforce his claim against the share of a particular heir, he must give that heir an opportunity of contesting the validity of his claim, and this can be done only by impleading that heir as a party to the suit. If some of the heirs of a deceased Muhammadan are not impleaded as defendants their shares in the inheritance cannot be adversely affected or be bound by a decree obtained behind their back without giving them an opportunity of contesting the claim. This was the view taken by the majority of the Judges in the Full Bench decision of the Calcutta High Court in *Assamathem Nessa Bibee v. Roy Lutchmeeput Singh* (1).

Similarly the last ground noted above does not in my judgment justify the decisions above referred to. It is true that on the execution of a mortgage the mortgagee's interest vests in the mortgagee and it is only the equity of redemption that is left with the mortgagor, which, on his death, devolves on his heirs, but every mortgagor has a right to redeem the mortgage and this right can only be

(1) (1878) I.L.R., 4 Cal., 142.



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taken away either after the period for redeeming the mortgage has expired, or an opportunity has been afforded to the owner of the equity of redemption to redeem the mortgage and he has failed to avail himself of the opportunity. A decree for sale obtained behind the back of a mortgagor cannot obviously be binding on him. On the death of a deceased Muhammadan mortgagor the equity of redemption owned by him devolves in specified shares on his heirs, and each heir, to the extent of the share inherited by him in the equity of redemption, occupies the position of a mortgagor. He has, therefore, the right to redeem the mortgage and this right can only be taken away from him if he has been given an opportunity of contesting the validity of the mortgagee's claim. If he is not impleaded as a defendant to the suit on the mortgage within the period of limitation the estate inherited by him cannot be adversely affected by the decree passed in the suit.

For the reasons given above I dismiss this application with costs.

### FULL BENCH

*Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Bennet and Mr. Justice Ganga Nath*

1935  
October, 22

ALAM ALI (DEFENDANT) v. BENI CHARAN (PLAINTIFF)\*

*Transfer of Property Act (IV of 1882), sections 74, 92, 95—Subrogation—Third mortgage executed after first mortgagee's decree—Third mortgagee paying off first mortgagee's decree to which second mortgagee was a party—Rights and powers arising out of such payment—Subrogation to right of priority as against second mortgagee's suit—Fresh charge enforceable within 12 years of the payment—Limitation Act (IX of 1908), article 132.*

*Held (GANGA NATH, J., dissenting) that where a property has been the subject of two simple mortgages and a suit has been brought for sale on the first mortgage and decreed against the second mortgagee also; and subsequently a third mortgage*

\*First Appeal No. 479 of 1932, from a decree of Pran Nath Aga, Additional Subordinate Judge of Moradabad, dated the 15th of June, 1932.

is taken and this mortgagee has paid the decretal amount, but has not obtained possession of the property; when the second mortgagee brings a suit for sale and makes the third mortgagee a party, the third mortgagee is entitled to claim a right of subrogation for the amount which he paid in discharge of the decree in the earlier mortgage suit, even though the period of limitation for a fresh suit on the first mortgage would now be barred.

Where a subsequent mortgagee redeemed a prior mortgage, he acquired under section 74 of the Transfer of Property Act only the rights and powers of the prior mortgagee and was entitled to bring a suit on the basis of that mortgage within 12 years of the mortgage; he acquired no fresh charge. But where a suit had already been brought on the original mortgage and had ripened into a mortgage decree, the mortgage merged in the decree and the rights and powers of the mortgagee decree-holder were those under the decree, which was alive at the time and which gave him a priority over subsequent encumbrancers and entitled him to recover his amount by sale of the property without any bar of limitation of 12 years from the date when the mortgage money became due. The payment of such a decree conferred on the subsequent encumbrancer all the substantive rights and powers of the mortgagee decree-holder as then subsisting, though the procedure to be followed by him had to be different as he was not an assignee of the decree.

The position has now been made clearer by the amendments to the Transfer of Property Act, and the right of subrogation conferred by the new section 92 is in no way narrower but really wider in scope than that conferred by the old section 74. From the provisions of the new section 92 it follows that the payment of the mortgage decree confers upon the person who pays it off a statutory right under that section, which right is not identical with the rights of an assignee of the mortgage but is an acquisition of a fresh charge, enforceable within the period of limitation applicable to such a suit. Article 132 of the Limitation Act would apply when the charge is sought to be enforced and the limitation of 12 years would run from the date when the decretal amount was paid off and the statutory right acquired.

Mr. *Mushtaq Ahmad*, for the appellant.

Mr. *Baleshwari Prasad*, for the respondent.

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SULAIMAN, C.J.:—This is an appeal by defendant No. 5 arising out of a suit brought for sale on the basis of a mortgage deed dated the 2nd of September, 1919, executed by defendants 1 to 3 in favour of the plaintiff's son. There were two earlier mortgages of 1909 and 1918, on the basis of which decrees for sale were obtained in 1922 and 1924. On the 22nd of April, 1928, the defendants 1 to 3 and others executed a mortgage deed in favour of defendant No. 5 of the same property along with others for Rs.10,000. On the findings, Rs.5,237 were borrowed and the decree of 1922 was paid off in January and February, 1928; and Rs.4,000 were left in the hands of the mortgagee for payment of the decree of 1924, which was paid off in January and June, 1930, by the defendant No. 5. The question in the present case is whether the defendant No. 5 having advanced money for the payment of these prior mortgage decrees is entitled to claim priority as against the plaintiff mortgagee, and the question has been formulated as follows: "Where a property has been the subject of two simple mortgages and a suit has been brought for sale on the first mortgage and decreed against the second mortgagee also; and subsequently a third mortgage is taken and this mortgagee has paid the decretal amount, but has not obtained possession of the property; when the second mortgagee brings a suit for sale and makes the third mortgagee a party, is the third mortgagee entitled to claim a right of subrogation for the amount which he paid in discharge of the decree in the earlier mortgage suit, even though the period of limitation for a fresh suit on the first mortgage would now be barred?"

It is convenient first to consider the position under the Transfer of Property Act as it stood at the time of the defendants' mortgage and at the time of the first two payments, and then to consider the effect of the Amending Act of 1929.

Under the old Act, quite apart from the rights allowed to mortgagors for contribution under section 82 and

section 95, the only section which allowed a right of subrogation to a subsequent mortgagee was section 74. Taking it literally, that section laid down a very narrow rule and was (1) confined to a subsequent mortgagee, (2) to payments to the next prior mortgagee, and (3) not to renewal of a mortgage.

Firstly, strictly speaking, it followed that there was no right given by that section to a purchaser of the property, as distinct from a subsequent mortgagee, if he paid off a prior mortgage. But their Lordships of the Privy Council applied a much wider equity in several cases, and upheld rights of subrogation even for purchasers: *Gokaldas Gopaldas v. Puranmal Premsukhdas* (1); *Gobind Lall Roy v. Ramjanam Misser* (2) and *Ayyareddi v. Gopalakrishnayya* (3). In the last mentioned case their Lordships observed: "It is now settled law that where in India there are several mortgages on a property, the owner of the property subject to the mortgages may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor, or to put it another way, he may keep the encumbrance alive for his benefit and thus come in before a later mortgagee."

Again, a prior mortgagee, who in execution of his own decree purchased property without impleading the subsequent mortgagee and got possession, could not, on a strictly literal interpretation of the section, be given a right of subrogation; but their Lordships applied the equitable rule that he would be entitled to use his mortgage as a shield. In the case of *Sukhi v. Ghulam Safdar Khan* (4) their Lordships laid down "that an owner of a property who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage is entitled at the suit of a subsequent mortgagee who is not bound by the sale or the decree on which it proceeded, to set up the first mortgage as a shield". This case was, of course, followed by the

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(1) (1884) I.L.R., 10 Cal., 1035.

(2) (1893) I.L.R., 21 Cal., 70.

(3) (1923) I.L.R., 47 Mad., 190.

(4) (1921) I.L.R., 43 All., 469 (475).

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majority of the Judges in the Full Bench case of *Ram Sanehi Lal v. Janki Prasad* (1).

Secondly, the section expressly dealt with the payment of the amount due on the *next prior* mortgage. *Prima facie* a third mortgagee would acquire no right under this section if he paid off the first mortgage without paying off the second mortgage which was next prior to his. Had the section been taken in its narrowest sense, no question of priority would have arisen as against a previous mortgagee. A third mortgagee with whom money was left for payment to prior mortgagees would be entitled to pay off both the first and the second mortgages or either of them and would be entitled to recover his own amount, together with the sums so paid, from the property as against the mortgagor and all subsequent transferees. A third mortgagee would not, therefore, have been able to advance money unless the security was sufficient to pay off both the earlier mortgages. By merely paying off the earlier mortgage he could not step into the shoes of the first mortgagee so as to acquire rights higher than the second mortgage. But such a narrow interpretation was considered to be against the rules of equity, justice and good conscience, and their Lordships of the Privy Council did not confine the principle of subrogation to the payment of the next prior mortgage only. In *Mahomed Ibrahim Hossain v. Ambika Pershad Singh* (2) their Lordships held that the charge created by a zarpeshgi lease of 1874 was kept alive by Mst. Alfau, a mortgagee of 1888 who had advanced money to pay that off, even as against holders of mortgages prior to 1888 and subsequent to 1874. This principle has been followed by this Court in numerous cases. The legislature has also adopted this view in the new section 92 which is not limited to payment to the next prior mortgagee.

Thirdly, a renewal of an earlier mortgage has been held to be within the scope of the rule of subrogation. On

(1) (1931) I.L.R., 53 All., 1023. (2) (1912) I.L.R., 39 Cal., 527.

a restricted view the section in terms contemplated the existence of two different mortgagees, one to whom money is due on a prior mortgage and the second who "tenders such amount" to the prior mortgagee, and might have excluded the case of a person who renews his own mortgage. But their Lordships have repeatedly laid down that priority can be claimed by him, provided he intended to keep alive the security. In *Dinobundhu Shaw Chowdhry v. Jogmaya Dasi* (1), where a mortgage had been executed in 1891 to pay off a mortgage of 1888, priority was allowed as against an attaching creditor who came in between. Their Lordships held that the question whether the charges were extinguished or kept alive for his benefit was simply a question of intention, and "The intention may be found in the circumstances attending the transaction, or may be presumed from a consideration of the fact whether it is or is not for his benefit that the charge should be kept on foot."

On the authorities, therefore, it must be taken to be established that the principle of subrogation was of more general application and had to be applied when equities had to be adjusted between rival mortgagees in the order of their priority.

Now when a prior mortgage was paid off, there could be three possible legal positions: (1) The person paying off the mortgage may be deemed to be the assignee of the mortgage, or (2) in the case where a mortgage has merged into a decree, the assignee of the decree, or (3) a person who is neither an assignee of the mortgage nor of the decree, but one who has under section 74 acquired the rights and the powers of the mortgagee so paid off.

With regard to his position as the assignee of the mortgage or the decree, it was held in the case of *Bansidhar v. Gaya Prasad* (2) that the rights and powers acquired by the person paying off the mortgage are to continue a pending suit and that he could not bring a fresh suit. And it was held in Madras and Bombay that the person

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(1) (1901) I.L.R., 29 Cal., 154(165). (2) (1901) I.L.R., 24 All., 179.



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paying off a mortgage decree was even entitled to execute the decree.

The authority of these cases was shaken, if not actually destroyed, by the pronouncement of their Lordships of the Privy Council in the case of *Gopi Narain Khauna v. Bansidhar* (1). In that case, which was governed by the old Act, although a puisne encumbrancer had been impleaded, the mortgage decree passed was in the form of the order given in section 86 of the Transfer of Property Act, which *prima facie* contemplated a suit between one mortgagee and the mortgagor only. The subsequent encumbrancer paid the amount of the decree and applied for a decree for absolute foreclosure, but his application was dismissed. He then instituted a suit for foreclosure within 12 years of the date of the mortgage which he paid off, and within three years of the date of his payment. Their Lordships held that the suit was not barred by section 244 of the Civil Procedure Code and that in view of the language of the decree that had been passed, a separate suit was the appropriate remedy, as a new decree was required for the purpose of working out the rights of the parties. Their Lordships also suggested that the appropriate decree to pass in such a case would be to provide for the exercise by the puisne encumbrancers of their successive rights of redemption, or for working out the rights of the parties in the event of any puisne encumbrancer, in front of the mortgagor, redeeming the property. It is the duty of the courts to see that proper decrees are framed. Particular attention should now be paid to the forms Nos. 9 and 10 of Appendix D of the Civil Procedure Code.

The question that arises in the present case is, what is to happen if no proper decree has been passed, or if the subsequent mortgage comes into existence after the decree? There is plenty of authority in support of the view that even then the payment of the prior mortgage decree confers new rights on the subsequent mortgagee.

(1) (1905) I.L.R. 27 All., 325.

In the case of *Shib Lal v. Munni Lal* (1) it was held by a Bench of this Court that by paying off a previous mortgage decree a subsequent mortgagee acquires a fresh charge on the property and can institute a separate suit within 12 years of the date of payment to enforce such a charge. In the case of *Mahomed Ibrahim Hossain v. Ambika Pershad Singh* (2), already referred to, their Lordships disallowed a claim for recovery of the amount paid to discharge the prior zarpeshgi deed when it was brought more than 12 years after the zarpeshgi lease and also more than 12 years after its payment by borrowing on a new mortgage. As that suit had been brought more than even 12 years after the date of the payment with the fresh advance, the question as to which of these dates should be the starting point of limitation did not necessarily arise. The language used by their Lordships undoubtedly indicated that the claim was barred by article 132 as it was brought more than 12 years after the date when the amount under the zarpeshgi deed became repayable, for their Lordships remarked (page 558): "But as the Rs.12,000 were, under the zarpeshgi deed of the 20th of November, 1874, repayable in Jeth 1294 Fasli (September, 1887) and this suit was not brought until the 22nd of September, 1900, the claim of the plaintiffs to priority is barred by article 132 of the second schedule of the Limitation Act, 1877." It would, therefore, seem that no fresh charge was created by the payment under section 74 of the old Transfer of Property Act.

In *Shib Lal's* case (1) it was not the mortgage itself which was paid off, but the amount due under the mortgage decree was paid off. Therefore it may be said that *Shib Lal's* case (1) has not by implication been completely overruled by this pronouncement.

The case of *Abbas Ali Khan v. Chote Lal* (3) was a case where subsequent transferees had paid off prior

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(1) (1921) I.L.R., 44 All., 67. (2) (1912) I.L.R., 39 Cal., 527.  
(3) (1926) I.L.R., 49 All., 162.



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mortgage decrees. So far as the plaintiff Chote Lal was concerned there was a previous decision in his favour giving him priority which operated as *res judicata*. So far as Abbas Ali was concerned he was a defendant in possession. That case can, therefore, be distinguished.

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In the case of *Aziz Ahmad Khan v. Chhote Lal* (1) the case of *Shib Lal v. Munni Lal* (2) was doubted. In this case it was a mortgage decree which was discharged by a co-mortgagor. Although on the date when he paid off the decree a suit on the previous mortgage would have been altogether barred, the Bench distinctly held that where a right of contribution arose it could only arise from the date of payment. But the question of subrogation did not directly arise, and the learned Judges themselves remarked at page 575: "We need not express any opinion at present as to how far this case was rightly decided. It would probably be necessary to reconsider the law laid down there, when a suitable occasion arises. The contention, however, before us is not whether a puisne mortgagee, by paying a prior mortgage, gets 12 years' time from the date of payment within which to enforce his newly acquired rights. The question before us is whether Chhote Lal having paid the decretal amount not as a puisne encumbrancer, but as a purchaser of the village of Nagla, was entitled to exact contribution from the remaining nine properties, and whether this claim for contribution is within time."

In *Ram Sarup v. Ram Richhpal* (3) a subsequent mortgagee who had advanced money towards the discharge of a first mortgage of 1904 was held entitled to priority over an intermediate mortgagee who held a mortgage of 1910 and sued more than 12 years after the first mortgage. The question of limitation was not directly raised in that case, and therefore strictly speaking not decided. It is just possible that a period might have been fixed for payment in the deed of 1904. The case turned

(1) (1928) I.L.R., 50 All., 569.

(2) (1921) I.L.R., 44 All., 67.

(3) (1929) I.L.R., 51 All., 920.

on the sole question whether a partial payment conferred rights of subrogation.

*Jokhu Bhunja v. Sitla Bakhsh Singh* (1) was a case of redemption, where the defendant mortgagee was in possession and his deed had itself provided that the mortgagor would not be entitled to redeem the earlier usufructuary mortgage without previous payment of the sum due under the second mortgage. There was a clear charge created on the property by the second mortgage and the defendant in possession was entitled to tack it on. The observation that no question of limitation can arise as against the defendant must be understood with reference to the facts of that case.

In the case of *Paras Ram v. Mewa Kunwar* (2) the plaintiffs, who were third mortgagees of the year 1909, had on the 22nd of July, 1908, paid off a prior mortgage of 1898 (1908 is a misprint for 1898) and allowed a decree on the second mortgage of 1904 to be passed against them, subject to the prior charge. When in 1926 they brought a suit on the basis of their mortgage, the claim was within time so far as their own mortgage was concerned, because there had been a period of five years fixed, but their claim for the enforcement of the charge on the prior mortgage was barred as it was brought more than 12 years after the mortgage and also more than 12 years after the payment by them. It was accordingly held that the claim was barred by time. No doubt the case of *Shib Lal v. Munni Lal* (3) was referred to as showing that if the plaintiffs could not sue on the basis of the mortgage of 1908, they could enforce the charge by virtue of their payment within 12 years. But no occasion arose for deciding this point, as the claim was barred by time in either case.

The Full Bench case of *Ram Sanahi Lal v. Janki Prasad* (4) was a case where a prior mortgagee had obtained the decree without impleading a subsequent mort-

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(1) (1929) I.L.R., 52 All., 539.  
(3) (1921) I.L.R., 44 All., 67.

(2) [1930] A. L. J., 890.  
(4) (1931) I.L.R., 53 All., 1023.

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gagee and had in execution of his own decree purchased the rights of the mortgagor and entered into possession. It was no doubt held by the majority that if the purchaser in execution of the prior mortgagee's decree is not in possession and is suing as plaintiff, the purchaser in execution of the subsequent mortgagee's decree (a) could enforce his decree, if limitation on the prior mortgage has not yet run out, but (b) he cannot recover the mortgage money, if limitation has run out. What was held there was that if the purchaser remains in possession, he could use his prior charge as a shield, a weapon of defence, but cannot use it as a weapon of offence if limitation on the mortgage has expired and he has to bring a suit for possession. That was not a case where a mortgage decree had been obtained against the subsequent mortgagee also and it was such a mortgage decree against him that was paid off. Obviously if a defendant interested in the equity of redemption is left out from the mortgage suit, then no rights can be enforced as against him, if he is in possession, after the period of limitation on the mortgage has already expired. The position of course is not identical if the mortgage has been sued upon, impleading the subsequent mortgagee, and a decree actually obtained as against him and also the mortgagor. It is this latter kind of case which has arisen in the appeal before us.

In the Full Bench case of *Tota Ram v. Ram Lal* (1) there were mortgages of 1915 and 1916 and a third mortgage of July, 1926, under which moneys were left for partial payment of both the mortgages as well as the other subsequent debts. In November, 1926, the first mortgage was fully paid off but the second mortgage was not discharged. In a suit brought by the second mortgagee the third mortgagees were impleaded as puisne mortgagees and set up their claim of priority on account of the payment of the prior mortgage. The suit had

(1) (1932) I.L.R., 54 All., 897.

been brought in 1928, more than 12 years after the mortgage of 1915, but within three years of the payment. The Full Bench held that under the amended section 92, which was retrospective, the defendants were subrogated to the position of the first mortgagee. Ultimately the property was ordered to be sold subject to the charge of the first mortgage. It is true that the question of limitation does not appear to have been directly raised, and the case of *Mahomed Ibrahim Hossain v. Ambika Pershad Singh* (1) was not at all referred to, but it must have been before the Bench prominently. It is arguable that the decision might have proceeded either on the assumption that a suit on the mortgage of 1915 was not till then barred or that as the sale was to be merely subject to the mortgage of 1915, it was unnecessary to decide the question of limitation. In that sense it may therefore be said that it was not necessarily decided that even if the mortgage had become barred by time the defendant was entitled to priority because he was a defendant. The sale having been ordered merely subject to the mortgage of 1915, the third mortgagee who had paid off that mortgage had necessarily to bring a separate suit to recover this amount in which the question of limitation would be finally decided. All the same the case favours the view put forward on behalf of the appellant.

In the case of *Bansidhar v. Shiv Singh* (2) money had been left in the hands of a subsequent mortgagee for the payment of a previous mortgage decree of 1906 which was paid off in September, 1921. More than six years after, on the 10th of September, 1928, the plaintiff brought a suit to recover the amount so paid as against a later mortgagee, who had purchased village Nahil in execution of his own decree. As the plaintiff's mortgage of Nahil was altogether void as the mortgagors were not competent to hypothecate it, he had to fall back on the payment of the previous mortgage. The Bench considered that the principle laid down in *Mahomed Ibrahim*

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(1) (1912) I.L.R., 39 Cal., 527.

(2) (1933) I.L.R., 56 All., 134.

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*Hossain v. Ambika Pershad Singh* (1) applied to the case, and that *Shib Lal's* case (2) was of doubtful authority. They held that the claim was barred by time. It was, however, pointed out that a right of reimbursement under section 69 of the Contract Act for which there is a shorter period of limitation starting from the date of payment might have been enforced if brought within time of the payment of the decree. It was certainly held that no fresh charge was acquired so as to give to the plaintiff a fresh period of 12 years, but it was also not held that on payment of the mortgage decree when 12 years had already expired the plaintiff acquired no rights whatsoever. The question whether a suit within six years of the payment would be maintainable did not arise for consideration. That case was decided under the provisions of the old Transfer of Property Act, and the effect of the Amending Act was not relied upon by counsel. Now if the payment of a mortgage decree was of no avail to the person who paid it off after the period of limitation on the mortgage has expired, then even on equitable grounds no subrogation might have been allowed to him and he might not have been entitled even to use the payment as a shield. But their Lordships of the Privy Council in *Sukhi v. Ghulam Safdar Khan* (3) upheld his right to keep alive the charge and he was allowed to claim the amount even after the lapse of considerable time. In that case the mortgages were of 1874 and 1875, and the mortgage decree and sale were of 1886. The second mortgagee of 1883 sued in 1910 and paid the amount in discharge of the mortgages of 1874 and 1875. On a suit brought in 1914 on the basis of the mortgage of 1902 the mortgagee of 1883 was allowed to set up his mortgage as a shield, and also his payment of the mortgages of 1874 and 1875. The latter's rights were upheld on the ground "that an owner of a property who is in the

(1) (1912) I.L.R., 39 Cal., 527. (2) (1921) I.L.R., 44 All., 67.  
(3) (1921) I.L.R., 43 All., 469.

rights of the first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage is entitled at the suit of a subsequent mortgagee who is not bound by the sale or the decree on which it proceeded, to set up the first mortgage as a shield." The same principle was followed by the Full Bench in *Ram Sanehi Lal v. Janki Prasad* (1). In that case there were mortgagees of 1911 and 1912 and both sued separately without impleading the other and obtained decrees and both purchased the property at auction. The prior mortgagee succeeded in obtaining possession through the revenue court. The subsequent mortgagee brought his suit more than 12 years after his mortgage, but within three years of the purchase made by the prior mortgagee. His rights were upheld. These cases are undoubtedly authorities in support of the view that when a mortgage decree, as distinct from the deed of mortgage, was paid off, even though more than 12 years after the mortgage when a suit on it would be barred by time, enforceable rights of priority were acquired by such payment. The very circumstance that their Lordships in *Sukhi's* case (2) suggested that the decree should provide for the exercise by the puisne encumbrancers of their successive rights of redemption, showed clearly that the payment of the decree, even after 12 years from the mortgage, would confer some rights, or else the court would have had no jurisdiction to make such a provision in the decree.

*Kotappa v. Raghavayya* (3) is the solitary case cited before us in which a mortgage decree had been paid off by a subsequent usufructuary mortgagee, and he was not allowed to claim the amount even in a suit for redemption brought against him by the mortgagor. The usufructuary mortgagee had actually preserved the property of the mortgagor by preventing its auction sale. It does not appear to have been argued before the learned

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(1) (1931) I.L.R., 53 All., 1023. (2) (1921) I.L.R., 43 All., 469.  
(3) (1926) I.L.R., 50 Mad., 626.



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Judges that the usufructuary mortgagee was entitled under section 72 of the Transfer of Property Act to spend money for the preservation of the mortgaged property from sale. With great respect, I am unable to agree with that decision because it seems to have been altogether overlooked that quite independently of section 74 the usufructuary mortgagee was entitled to recover the amount paid by him for the discharge of the prior mortgage decree, at least from the mortgagor: See *Abdul Qayyum v. Sadr-ud-din Ahmad* (1) and *Muhammad Husain v. Sheodarshan Das* (2).

No doubt in that case the learned Judges instead of applying section 72 thought that section 74 was applicable, although as between the mortgagor and the usufructuary mortgagee there could be no question of any priority at all. WALLACE, J., had expressed a somewhat contrary opinion in *Parvati Ammal v Venkatarama Iyer* (3) which he modified. The learned Judges considered that the case was governed by the *ratio decidendi* in *Gopi Narain Khauna's* case (4) and *Mahomed Ibrahim Hossain's* case (5), both of which were obviously distinguishable. Some reliance was also placed on the case of *Sibanand Misra v. Jagmohan Lall* (6), although that was not a case of a payment of a mortgage decree at all.

There can be no doubt that a subsequent mortgagee paying off the prior mortgage acquired all the rights and powers of the mortgagee under section 74. Under that section the rights and powers become vested in him. There is no assignment of the mortgage or the mortgage decree to him, but it is the vesting of the rights and powers of the mortgagee by operation of law. It is noteworthy that the legislature had used two words, "rights" and "powers", which were distinct in meaning. "Rights" of course meant substantive rights to recover his money, a right of priority over subsequent incum-

(1) (1904) I.L.R., 27 All., 403.

(3) (1924) 47 M.L.J., 316.

(5) (1912) I.L.R., 39 Cal., 527.

(2) (1907) 4 A.L.J., 176.

(4) (1905) I.L.R., 27 All., 325.

(6) (1922) I.L.R., 1 Pat., 780.

brancers and transferees—rights *in praesenti*, if the mortgage is not extinguished, or in the case of a mortgage decree, if the decree has not become barred by time. “Powers” obviously meant the powers to enforce those rights by adopting the proper procedure recognized by law. The powers then possessed by the prior mortgagee are, in the case of a mere mortgagee, to file a suit for sale within the period of limitation by enforcing the charge, and in the case of a holder of a mortgage decree, to file an application for execution of the decree and realise his decretal money.

If a puisne mortgagee paid off a prior mortgage before any suit had been brought on the mortgage, the right of the mortgagee which he could acquire was obviously the right under the mortgage to enforce the charge and claim priority, and the power he acquired was to bring a suit on the basis of it within 12 years of the mortgage under article 132 of the Limitation Act. But where the mortgage had already been sued upon and had merged in a mortgage decree, which might happen well after the expiry of 12 years from the original mortgage, the payment of the mortgage decree, if it conferred nothing upon the puisne mortgagee but a right to bring a suit on the basis of the previous mortgage, would give him no right or power at all. It would give him not only much less than what the mortgagee had at the time of payment, but indeed absolutely nothing. On the date of the payment the prior mortgagee was entitled to execute his decree, enforce the charge and recover the amount in execution, and claim priority over all subsequent incumbrancers; but the puisne mortgagee who paid off the mortgage decree would find himself in the helpless position of not being able to execute the decree as he was not an assignee of the decree and not being able to bring a fresh suit on the mortgage deed as that would be barred by time. He would thus acquire no powers and rights which the prior mortgagee possessed, and his payment of the mortgage decree would be a simple

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discharge of the prior debt without giving him any rights or powers to recover the amount so paid as against the second mortgagee, whose mortgage also was subject to the decretal charge.

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In a suit for sale brought on a prior mortgage within time a decree for sale might have been obtained after the expiry of the ordinary 12 years, not only against the mortgagor, but also against two successive mortgagees, without unfortunately there being in it any express terms providing for the rights of subrogation. Under the old section 74, if the mortgagor himself paid the mortgage decree, it might have been said that he acquired no rights of priority at all because it was his duty to pay all the mortgages. But how could the third mortgagee pay off the decretal amount, if he would not be entitled to recover it as against the second mortgagee? By paying it off he would benefit the second mortgagee, without the right of recovering it by a separate suit, unless the property was sufficient to discharge all the debts. To hold this would be tantamount to holding that although the preliminary decree directed that the defendants should pay the amount within the period fixed, neither of them could really pay it except at his peril.

Under section 95 a co-mortgagor redeeming a prior mortgage was entitled to a charge on the share of his co-mortgagors, and it was held in many cases that the right to enforce this charge accrued on the date of payment, and even though at the time of the suit the limitation on the mortgage might have expired: See *Umar Ali v. Asmat Ali* (1). The last mentioned case was decided under the old section 95 and the charge was enforced; the dictum as to the possible effect of the new section 92 was professedly not any final opinion. It would be difficult to hold that although a mortgagor paying off the amount of the joint decree against himself and his

(1) (1931) I.L.R., 58 Cal. 167.

co-mortgagor, even though 12 years of the mortgage had expired, would be entitled to enforce his charge against his co-mortgagor by a separate suit for which under section 95 his right to sue would accrue on the date of payment, a subsequent mortgagee paying off a prior mortgage decree in similar circumstances had under section 74 lesser rights; and if the limitation on the old mortgage had already expired he acquired no right in reality. I am inclined to think that section 74 was intended to confer higher rights on the subsequent mortgagee than section 95 did on a co-mortgagor. as probably in the latter case the charge could not be enforced against a transferee without notice, while it could in the former case.

It seems to me that where a subsequent mortgagee redeemed a prior mortgage, he under section 74 acquired only the rights and powers of the mortgagee and was entitled to bring a suit on the basis of the mortgage within 12 years of the mortgage. He acquired no fresh charge. But where a suit had already been brought on the original mortgage and had ripened into a mortgage decree, the mortgage merged into the decree and the powers and rights of the mortgagee decree-holder were those under the decree, which was alive at the time and which gave him a priority over subsequent encumbrancers and entitled him to recover his amount by sale of the property without any bar of limitation. The payment of such a decree conferred on the subsequent encumbrancer all the rights and powers of the mortgagee decree-holder as then subsisting, though the procedure to be followed by him had to be different. No doubt under the ruling of their Lordships of the Privy Council in *Gopi Narain Khauna's* case (1) he was not entitled, at any rate not bound, to execute the decree, if the decree was not properly framed. But it would be too much to say that if on the date when he paid off the decree 12 years had already expired from the date of the original mortgage he acquired no enforceable right

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(1) (1905) I.L.R., 27 All., 325.

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whatsoever. To hold this would be to grant him the statutory rights and powers of the mortgagee decree-holder on account of his payment, and at the same time to deny him those rights on the ground of limitation. I think that this was not the position contemplated by the legislature, nor would it be in accordance with the rule of justice, equity and good conscience.

The position is now made much clearer by the amendments of the old Transfer of Property Act. In view of the fact that the saving clause, section 63 of Act XX of 1929, did not refer to sections 39, 47 and 48 of the Amending Act, under which the old sections 74 and 95 were replaced by new sections, the Full Bench in the case of *Tota Ram v. Ram Lal* (1) held that the new section 92 had a retrospective effect. The legislature has made it retrospective in order to obviate the difficulty created by the language of the old section.

There is a marked contrast between the provisions of the old Act and the new Act. In the first place, section 74 of Act IV of 1882 did not in terms apply to the payment of a mortgage decree, for it said "And such mortgagee is bound to accept such tender and to give a receipt for such amount" and that "The subsequent mortgagee shall, on obtaining such receipt, acquire" etc. These words were appropriate to a redemption of the mortgage out of court by payment of the money direct to the mortgagee who was to grant a receipt, and the rights and powers of the prior mortgagees were acquired "on obtaining such a receipt". The new section 92 merely says "on redeeming property subject to the mortgage" and can refer both to the payment of a mortgage out of court and the payment of a mortgage decree.

In the second place, section 74 did not refer to payment by a co-mortgagor, who acquired a charge under section 95. As regards the co-mortgagor it was therefore clear that he acquired a fresh charge by virtue of

(1) (1932) I.L.R., 54 All., 897.

his payment on the date of redemption. In the amended Act no fresh charge is given to a co-mortgagor under section 95, but he is allowed to enforce his right of subrogation under the new section 92 against his co-mortgagors. It is also clear that a co-mortgagor is on the same footing as a subsequent mortgagee and acquires the same rights by redeeming a prior mortgage.

In the third place, the new section 92 confers on a subsequent mortgagee and co-mortgagor the rights of the prior mortgagee whom they redeem, as against "any other mortgagee". The section is not confined to the payment to the next prior mortgagee, nor are the rights acquired under it exercisable only against subsequent mortgagees.

Now it can hardly be considered that the charge which the co-mortgagor acquired under the old section 95 by payment of a mortgage debt has been extinguished by the new provisions, and that if a co-mortgagor pays off a mortgage decree after twelve years have expired from the date of the mortgage he has no rights whatsoever against the co-mortgagor. The acquisition of "the same rights" as the prior mortgagee must mean the same rights which that mortgagee possessed at the time of the payment, and the rights which he possessed at that time included a subsisting right to enforce the charge. This was a substantive right, while the remedy to enforce it by execution of the decree and not by suit was a matter of procedure only.

Section 82, both old and new, merely fixes the rateable liability of the several properties mortgaged, and could create a charge only if the debt were "paid out of" a few items of the property. In such an event, the co-mortgagor can enforce his charge under section 100. But these sections would apply only when the debt has been realised by sale of the properties. If section 92 cannot help a co-mortgagor, then it would follow that when there is a mortgage decree for sale of several properties belonging to different mortgagors or their representatives

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and 12 years from the time of the mortgage have expired, there would be hardly any option but to let the property be sold, for if any co-mortgagor wishes to save his share from sale by depositing the decretal amount in court, he must do so at his peril for he may not be able to recover the rateable share from the properties of the other co-mortgagors. If the mortgagor allows his property to be sold he would acquire a charge, but if he saves his property from sale by paying the amount in cash he would not. Such a position, in my opinion, could never have been intended by the legislature.

The right of subrogation which a co-mortgagor can enforce under the new section 95 is the right which he acquires under the new section 92, and it must mean the statutory right of foreclosure or sale. It follows that a subsequent mortgagee paying off a mortgage decree is in the same position and acquires similar rights not only against the mortgagor but also against "any other mortgagee". Unless it be held that a fresh charge is created by virtue of this statutory provision, the rights conferred by the section may in most cases be nugatory and unenforceable. It seems to me that the right of subrogation conferred by the new section 92 is in no way narrower but really wider in scope than that conferred by the old section 74, especially as more emphatic words are now used. This view is in consonance with the view expressed in the Full Bench case of *Tota Ram v. Ram Lal* (1).

The right of reimbursement under section 69 of the Contract Act might with advantage have been enforced within three years against the co-mortgagor personally, but the aid of that section could hardly have been invoked by a subsequent mortgagee against another who was prior to him, as the latter was no more bound by law to pay the amount than the former.

Now the rights of the parties are governed by the provisions of section 92, as amended, and the necessary

(1) (1932) I.L.R., 54 All., 897.

inference from it is that the payment of the mortgage decree conferred upon the person who paid it off a statutory right under that section, which right was not identical with the rights of an assignee of the mortgage itself but was an acquisition of a fresh charge enforceable within the period of limitation applicable to such a suit.

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Article 132 would apply when the charge is sought to be enforced, and limitation would run from the date when the decretal amount was paid and the statutory right acquired.

Under order XXXIV, rule 12 of the Civil Procedure Code a person who is subrogated to the position of a prior mortgagee can, when consenting, recover the amount due to him out of the sale proceeds, provided his rights have not become extinguished by lapse of time.

I am, therefore, of the opinion that the defendant by paying off the amounts due on the mortgage decree in 1928 and 1930 acquired the rights of the mortgagee decree-holder to recover his money by enforcement of a fresh charge within twelve years of the redemption.

BENNET, J.:—I concur.

GANGA NATH, J.:—The following point has been referred to the Full Bench for a decision: "Where a property has been the subject of two simple mortgages and a suit has been brought for sale on the first mortgage and decreed against the second mortgagee also; and subsequently a third mortgage is taken and this mortgagee has paid the decretal amount but has not obtained possession of the property; when the second mortgagee brings a suit for sale and makes the third mortgagee a party is the third mortgagee entitled to claim a right to subrogation for the amount which he paid in discharge of the decree in the earlier mortgage suit, even though the period of limitation for a fresh suit on the first mortgage would now be barred?"



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The facts out of which this point has arisen have been given in the referring order and are as follows. The plaintiff respondent brought a suit on the basis of a mortgage deed, dated the 2nd of September, 1919, against his mortgagor and the defendant appellant, who is a subsequent mortgagee. The defendant appellant holds a mortgage of the 22nd of April, 1928. This mortgage deed was executed for Rs.10,000. Out of it Rs.4,400 were left with the defendant for payment of the amount due under the hypothecation decree passed by the court of the Second Subordinate Judge of Moradabad on the 7th of January, 1925, in suit No. 129 of 1924, Sahu Salek Chand v. Mubarak Husain and others. Rs.5,237 were taken by the executants for payment to Sahu Salek Chand on account of another decree No. 99 of 1922. These decrees had been obtained on the basis of two earlier mortgages of the 18th of September, 1909, and the 20th of July, 1918. These mortgages were simple mortgages and the decrees were decrees for sale to which the present plaintiff as a subsequent mortgagee had been impleaded. The defendant contended that he should be given priority over the second mortgagee on account of the discharge of the earlier mortgages of 1909 and 1918.

In order to determine the point referred to the Full Bench, it is necessary to ascertain the nature and extent of the right of the third mortgagee. Before the Amending Act XX of 1929, section 74 of the Transfer of Property Act laid down: "Any second or other subsequent mortgagee may, at any time after the amount due on the next prior mortgage has become payable, tender such amount to the next prior mortgagee, and such mortgagee is bound to accept such tender and to give a receipt for such amount; and (subject to the provisions of the law for the time being in force regulating the registration of documents) the subsequent mortgagee shall, on obtaining such receipt, acquire, in respect of the property, all the rights and powers of the mortgagee, as such, to whom he has made such tender." Under the Amending Act

this section as well as section 95 of the Transfer of Property Act were replaced by section 92 which lays down: "Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee. The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems."

So far as the subsequent mortgagee's rights are concerned there is no difference between the provisions of section 74 and section 92. There has been some change so far as the redeeming co-mortgagor's rights are concerned. Section 95 of the Transfer of Property Act before the amendment was: "Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession." Under this section the co-mortgagor had not the right of subrogation which has now been conferred on him under section 92 of the Transfer of Property Act. A co-mortgagor and a subsequent mortgagee who redeem a prior mortgage have now been put in the same position and have been given the same right of subrogation.

The defendant was the third mortgagee. He made some payments out of the mortgage money before the amendments, in January and February, 1928, and some thereafter in January and June, 1930. As the provisions of both the old section 74 and the present section 92 of the Transfer of Property Act are substantially the same so far as his rights are concerned, his rights are not affected whether they are considered under the old section or the present section. Though the word "subrogation"

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was not used in old section 74, yet he had the same rights as are now conferred under the term "subrogation" on him in section 92. The right conferred on the mortgagee has now been defined as subrogation. The defendant did not acquire any right to enforce the security independently of the rights of the mortgagee whom he paid off. He acquired the same right as the mortgagee, whose mortgage he redeemed, had against the mortgagor or any other subsequent mortgagee, as regards redemption, foreclosure or sale of the redeemed property.

He has been substituted for the mortgagee whom he has paid off. The distinctive feature of the subrogation is that the incumbrance that is paid off is not extinguished but is treated as kept alive and assigned to the person making the payment. The words in section 74 "all the rights and powers of the mortgagee, as such, to whom he has made such tender" and in section 92 "the same rights as the mortgagee whose mortgage he redeems may have" point to the same conclusion. So this is clear that he had no independent right of his own to enforce the mortgage security and what he acquired was the right of the mortgagee whom he had paid off and his remedy is to enforce the same security as the redeemed mortgagee had. It being so, the only article of the Limitation Act which applies to this case is article 132. Under it the period of limitation is 12 years from the time when the money sued for becomes due. In this case the money sued for is the money which is charged on the mortgaged property. The defendant would, therefore, have the same period of limitation for enforcing payment of the money charged upon the mortgaged property as the original mortgagee had.

The case directly in point is *Mahomed Ibrahim Hossain v. Ambika Pershad Singh* (1). There, in the first place, there was a zar-i-peshgi lease of 1874 in favour of Girwar Singh for Rs.12,000 under which possession was delivered. This was followed by mortgages of 1879,

(1) (1912) I.L.R., 39 Cal., 527.

1880 and January, 1888. Lastly there was a mortgage of February 17, 1888, in favour of Mst. Alfán, which was for the express purpose of paying off the zar-i-peshgi debt, which Mst. Alfán discharged (page 550). The representatives of Mst. Alfán brought a suit in 1900 to enforce not only the mortgage of February 17, 1888, but also to recover the sum of Rs.12,000 due on the zar-i-peshgi lease, on the ground that they had paid that amount and thereby acquired priority as against the intermediate mortgagees of 1879, 1880 and January, 1888. There were pleas of *res judicata* and limitation and also a plea that the charge created by the zar-i-peshgi lease had not been kept alive. On page 555 their Lordships came to the conclusion that the charge created by the zar-i-peshgi lease was kept alive for the benefit of Mst. Alfán. On page 558 their Lordships held that as Mst. Alfán had not been made a defendant in a previous suit brought by an intermediate mortgagee, although she was a necessary party, her rights were not affected by the decree and there was no bar of *res judicata*. Having recorded these findings their Lordships went on to observe at page 558: "But as the Rs.12,000 were, under the zar-i-peshgi deed of the 20th of November, 1874, repayable in Jeth 1294 Fasli (September, 1887) and this suit was not brought until the 22nd of September, 1900, the claim of the plaintiffs to priority is barred by article 132 of the second schedule of the Indian Limitation Act, 1877." Mst. Alfán's representatives were therefore not allowed to claim priority on account of their having paid off the amount due under the zar-i-peshgi lease although that lease was prior in point of time to the mortgages of the contesting defendants; and the ground on which the claim was disallowed was that the period of limitation prescribed for the enforcement of the charge under the zar-i-peshgi lease had expired. The mere fact that Mst. Alfán paid off the lease in July, 1888, did not entitle her representatives to recover the amount. This was a case in which the prior mortgage was paid off before a decree was obtained on it.

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In *Rajkumari Debi v. Mukundalal* (1) it was held that a co-mortgagor seeking contribution must bring his case within the period within which a mortgagee could have brought a suit to enforce his mortgage. This case had been decided under the old section 95. In *Umar Ali v. Asmat Ali* (2) the Full Bench consisting of five learned Judges while deciding that the decision of *Rajkumari's* case (1) was wrong under the old Act held that in effect it was now the statute law. Under the old Act a co-mortgagor had a different right under section 95 from the one a mortgagee had under section 72. In the new Act section 95 finds no place and both of them have been placed in the same position, and consequently the same rule of limitation would now apply to both.

It would make no difference whether the payment by the puisne mortgagee is made after the obtaining of a decree by the first mortgagee or before. It is the redemption of the mortgaged property which confers a right of subrogation under section 92; and the mortgaged property can be redeemed even after a decree has been passed till the sale which might take place under the decree is confirmed or a final decree for foreclosure is passed. The mortgage charge on the property is not extinguished by the passing of the decree but the charge attaches itself to the decree, which the decree enforces after it is passed. If the puisne mortgagee gets his right to enforce the security by virtue of old section 74 or new section 92 of the Transfer of Property Act, which are substantially the same, then he is bound to enforce his right within the period of limitation allowed to the first mortgagee.

The decision in *Gopi Narain Khauna v. Bansidhar* (3) settles the point as to what are the rights of the redeeming mortgagee and to what relief he is entitled. The fact that it was decided under the old section 74 would not make any difference as there is no difference in old

(1) (1920) 25 C.W.N., 283.

(2) (1931) I.L.R., 58 Cal., 1167.

(3) (1905) I.L.R., 27 All., 325.

section 74 and new section 92. There, on July 20, 1889, Chaudhri Fateh Chand executed a mortgage by conditional sale in favour of the respondents Bansidhar and Kunj Behari Lal for Rs.7,101. The mortgaged property consisted of two villages Patara and Bhatpura. On October 22, 1889, the same mortgagor executed a second mortgage by conditional sale in favour of Anant Ram and the respondent for Rs.10,000 and interest. This mortgage comprised Patara and eight other villages, not including Bhatpura. On October 1, 1891, Anant Ram sold his moiety of this mortgage to Gaya Prasad. On September 17, 1893, a suit (No. 123 of 1893) was brought for foreclosure of first mortgage by the respondent and Kunj Behari Lal, the first mortgagees on Patara, against Chaudhri Raj Kunwar, son and heir of Chaudhri Fateh Chand (then deceased), Gaya Prasad, and a third mortgagee on the same property. Bhatpura was disposed of under a prior hypothecation, and was excluded from the suit by order. On September 27, 1893, another suit (No. 122 of 1893) was brought for foreclosure of the second mortgage by the respondent and Gaya Prasad against Chaudhri Raj Kunwar and the third mortgagee. On December 22, 1894, decrees were passed in both the suits in the same form. On May 7, 1898, a decree absolute for foreclosure was passed in the suit of the second mortgagees (No. 122 of 1893). The time for redemption on the decree in the suit on the first mortgage (No. 123 of 1893) was from time to time enlarged but the money was not paid by the mortgagor. On January 3, 1896, when the enlarged time was about to expire, Gaya Prasad paid into court a sum of Rs.15,093, and that sum was taken out by the plaintiffs, the first mortgagees, in discharge of their mortgage. On August 3, 1897, Gaya Prasad made an application to the court that a decree for absolute foreclosure of the mortgaged property might be prepared in his favour. The application was dismissed by the Subordinate Judge who held that Gaya Prasad had

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become the representative of the prior mortgagee under section 74 of the Transfer of Property Act and was entitled to bring a suit for foreclosure, but that he had not acquired the status of a decree-holder. Gaya Prasad then, on February 3, 1898, filed a suit against Bansidhar, Kunj Behari Lal, the widow and heir of Chaudhri Raj Kunwar (then deceased) and the representative of the third mortgagee. The plaintiff prayed for three reliefs: (1) for obtaining a decree absolute without a condition of redemption of mortgage; (2) in the event of the first prayer not being granted, for a decree under section 86 of the Transfer of Property Act, fixing specified period, and in the event of non-compliance therewith for a decree absolute; (3) in case the aforesaid two prayers were not granted, then for a decree for Rs.7,546-8-0 to be passed against the person and property of Babu Bansidhar, defendant No. 1.

The question as to what relief the plaintiff was entitled to, and the fact that a decree on the first mortgage had been passed, were prominently before their Lordships of the Privy Council. Their Lordships observed on page 331: "The plaint contains a statement of all the material circumstances, but the prayer of it is inartificially framed. In the opinion of their Lordships, however, it was sufficient, with the aid of the prayer for further relief, to enable the court to give the plaintiff the appropriate relief if he was otherwise entitled to it." So the relief granted by their Lordships in the case was the appropriate relief to which the plaintiff was entitled in the case where the first mortgage was paid off by a puisne mortgagee after a decree on the first mortgage had been passed. The relief granted by their Lordships was (see page 333): "that it should be declared that it appearing that in the events which have happened the appellants, as representatives of Babu Gaya Prasad, the late plaintiff, and the respondent Babu Bansidhar, defendant No. 1, as between themselves have become the owners in equal shares of the village Patara, with the hamlets

(naglas) appertaining thereto in the plaint mentioned, subject to a charge thereon vested in the appellants for Rs.15,093, being the sum paid into court by Babu Gaya Prasad on the 3rd of January, 1896, in suit No. 123 of 1893, together with subsequent interest from the last mentioned date on the principal money comprised in that sum, the appellants are entitled to a decree in this suit, that upon the respondent, Babu Bansidhar, on or before a day to be fixed by the court, paying to the appellants, or into court, the sum of Rs.7,546-8-0, being one moiety of Rs.15,093, together with future interest at the rate of 8 annas per cent. per mensem on Rs.3,550-8-0, being one moiety of the principal sum of Rs.7,101 in the plaint mentioned, from the 3rd of January, 1896, to the date fixed for such payment, together with the costs . . . the appellants shall accept the sum so paid in satisfaction of their said charge on the said property mentioned in the plaint so far as affects the respondent or his share in the said property; but if payment be not made on or before the said day to be fixed by the court the respondent shall be absolutely debarred of all right to redeem his said share of the said property."

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Their Lordships also observed on page 332: "Foreclosure is by the decree directed only in the event of the sum named not being paid into court on or before the prescribed date. And their Lordships think that on payment by Gaya Prasad of the sum into court before the expiry of the enlarged time, and acceptance of that sum by the plaintiffs, the decree was spent and became discharged and satisfied. There was therefore nothing left to be done in the execution department. It is true that Gaya Prasad, having made that payment (as he had the right to do), acquired under section 74 of the Transfer of Property Act all the rights and powers of the mortgagees as such. But this would not have the effect of reviving or giving vitality to a decree which by the terms of it had become discharged." Their Lordships



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thus by passing a decree for foreclosure held that the second mortgagee, who had paid off the first mortgagee the amount due to him after a decree on the first mortgage, was entitled to establish by a suit his right to enforce the charge under the first mortgage even though it had by that time become merged in a decree.

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In *Parvati Ammal v. Venkatarama Iyer* (1) there was the question of the right of a puisne mortgagee who had paid up an execution sale amount for which the property had been brought to sale on a prior mortgagee's decree. WALLACE, J., held that the plaintiff (the puisne mortgagee) was subrogated to the decree charge held by the prior mortgagee, i.e., the right to hold the property to sale to discharge the decree debt. Subsequently, in the light of the Privy Council ruling in *Gopi Narain Khauna v. Bansidhar* (2) referred to above, he had to modify his view in *Kotappa v. Raghavayya* (3). He observed at page 630: "But on further consideration I must admit that the technical difficulties in the way of this view are harder to surmount than those in the way of the view that the charge which the puisne mortgagee is entitled to enforce is the original mortgage charge in its form of a mortgage charge which must be enforced in that form although it has become merged in a decree. This, I think, is the logical result of the decision of the Privy Council in *Gopi Narain Khauna v. Bansidhar* (2), which becomes clear when the case is closely studied."

In *Kotappa v. Raghavayya* (3), referred to above, it was held by WALLACE and MADHAVAN NAYAR, JJ., that "When a puisne mortgagee pays off a decree on a prior hypothecation, he is subrogated to the right of the prior hypothecatee. He is not entitled to enforce the decree as such but can only enforce his charge arising by subrogation. The period within which he should enforce it is 12 years from the date on which a suit on the

(1) (1924) 47 M.L.J., 316.

(2) (1905) I.L.R., 27 All., 325.

(3) (1926) I.L.R., 50 Mad., 626.

hypothecation should have been brought and not 12 years from the date of payment."

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The other case also in point in which payment was made after the decree is *Bansidhar v. Shiv Singh* (1). There under a mortgage in favour of the plaintiff money was left with him for payment of a previous mortgage decree of 1906 and he paid the amount due under the previous mortgage decree. In the suit brought by the plaintiff he claimed to recover the amount paid by him as against the defendant, a subsequent mortgagee, who purchased the property in execution of his mortgage decree. It was held that limitation on the previous mortgage of 1906 having run out the plaintiff could not recover the amount paid by him to discharge the previous mortgage. The plaintiff might have enforced his personal right of reimbursement, under section 69 of the Contract Act, for which there is a shorter period of limitation though it would start from the date of payment; but he could not claim that the payment made by him created a fresh charge in his favour which gave him a fresh start of limitation as against everybody concerned.

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The learned counsel for the appellant has referred to a number of cases in most of which it was decided that a subsequent mortgagee who redeems a prior mortgagee acquires a priority over the intermediate mortgagees. This point is not disputed. It was also urged by the learned counsel that in some of these cases very old mortgages had been paid off by subsequent mortgagees, in respect of which the subsequent mortgagees who paid them off were given a right of priority. In those cases no question of limitation arose nor was it considered. If the claim of the subrogee had been time barred, the question must have been raised and considered; but there is nothing to show that the claim had become time barred. Since the point of limitation did not arise and

(1) (1933) I.L.R., 56 All., 134.



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was not considered in these cases, they cannot be regarded as any authority on this point.

The only case in point cited by the learned counsel for the appellant is *Shib Lal v. Munni Lal* (1). There it was held that where a prior mortgagee sues upon his mortgage, impleading the puisne mortgagee, and obtains a decree for sale, and the puisne mortgagee pays off and discharges the decree, he thereby acquires, on the principle of section 95 and section 74 of the Transfer of Property Act, a charge upon the property, which he can sue to enforce within 12 years of the date on which he made the payment; that he is also entitled, under the provisions of section 69 of the Contract Act, to be reimbursed the money by the mortgagors and can sue to recover it from the mortgagors personally within three years of the date of his payment, under article 61 of the Limitation Act; and that he is not an assignee of the prior mortgagee, although his rights may be akin to those of an assignee, and hence the limitation of time within which a suit by the prior mortgagee had to be brought does not apply to him, nor is his suit to enforce the charge acquired by him a suit to enforce the prior mortgage. It was observed on page 69: "As there was a charge on the mortgagors' property in favour of the first mortgagee, and the second mortgagee, the present plaintiff, discharged that charge, he acquired a charge on the property. On the principle of section 95 of the Transfer of Property Act which has been held not to be exhaustive, a co-mortgagor who discharges a mortgage is entitled to a charge on the property of the other mortgagor. On the same principle a second mortgagee who discharges a prior mortgage acquires a charge on the property which he relieves of liability for that mortgage. This is also manifest from the provisions of section 74."

The difference between the provisions of section 95 and section 74 of the Transfer of Property Act seems to

(1) (1921) I.L.R., 44 All., 67.

have been overlooked. There was a marked contrast between the language of section 95 which dealt with a co-mortgagor and that of section 74 which dealt with a puisne mortgagee. Section 95 conferred a charge. The definition of the charge, given in section 100 of the Transfer of Property Act, shows that the charge is not the same as a mortgage. Section 100 says: "Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the *transaction does not amount to a mortgage*, the latter person is said to have a charge on the property." The right given to a co-mortgagor was therefore not the same as that given to a puisne mortgagee, because a puisne mortgagee could stand upon the original mortgage and enforce all the rights of the prior mortgagee against his mortgagor and subsequent mortgagees, while a co-mortgagor could not.

There is a difference between a charge and a mortgage. A charge cannot be enforced against a transferee for consideration without notice while there is no such restriction in the case of a mortgage. Under a charge a property may always be liable for sale; while in the case of a mortgage, it is not so when the mortgage is usufructuary or by conditional sale.

In *Mahomed Ibrahim Hossain v. Ambika Pershad Singh* (1) their Lordships of the Privy Council held that in a case of a puisne mortgagee who had redeemed the first mortgage his right to stand upon the prior security was not a new right which accrued to him upon his redemption of that security but was one to which article 132 of the Limitation Act of 1877 had to be applied, counting the period of 12 years from the due date of the original security.

Before the amendments, the rights of the co-mortgagor who paid off the entire mortgage debt were not analogous to those of a puisne mortgagee paying off the prior

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(1) (1912) I.L.R., 39 Cal., 527.

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mortgage, probably on the principle that one of the co-debtors paying off the entire debt is only entitled to contribution from the other debtors. A co-mortgagor was given a right of contribution which he could enforce by a charge on the share of his co-debtors. A puisne mortgagee was placed on a higher footing and was given a right of substitution for the mortgagee he paid off, and therefore he was given all the rights and powers of the mortgagee as such in respect of the property comprised in the earlier mortgage, which he paid off.

This case, *Shib Lal v. Munni Lal* (1), is not free from objections and has been dissented from by the Madras High Court in *Kotappa v. Raghavayya* (2) referred to above, *Sibanand Misra v. Jagmohan Lall* (3), and by this Court in *Bansidhar v. Shiv Singh* (4) referred to above. The next case cited in favour of the appellant is *Abbas Ali Khan v. Chote Lal* (5). There the only point considered was the interpretation of section 89. It was held that a subsequent transferee, who pays off the prior mortgagees who have obtained decrees for sale on their mortgages, is entitled to priority to the extent of the amounts paid as against any intermediate mortgagees. As regards the right of priority, as already stated, there is no question.

The third case cited which is in favour of the appellant is *Paras Ram v. Mewa Kunwar* (6). There the following observations were made at page 897: "Accordingly the only remedy that was left open to the present plaintiffs who had paid off the prior mortgage of 1908 was, if not to sue on the basis of the mortgage of 1908 of which strictly speaking they were not assignees, to recover the amount by enforcing a charge on the property within 12 years of the date of their payment." For these observations *Shib Lal v. Munni Lal* (1) which has been discussed above was taken as an authority.

(1) (1921) I.L.R., 44 All., 67.

(3) (1922) I.L.R., 1 Pat., 780.

(5) (1926) I.L.R., 49 All., 162.

(2) (1926) I.L.R., 50 Mad., 626.

(4) (1933) I.L.R., 56 All., 34.

(6) [1930] A.L.J., 890.

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A question incidentally arises as to what would be the effect on the rights of the mortgagors and subsequent mortgagees if a suit is brought by a prior mortgagee for the sale of the property at the close of the period of 12 years and the period expires during the pendency of the suit. In the natural course of things when subsequent mortgages are made, the presumption is that the mortgaged property affords sufficient security for all the mortgages that are made. If it were not so, no subsequent mortgagee would advance any money on the security of a property on which prior mortgages exist. There can be no doubt that a subsequent mortgagee would not care to redeem a prior mortgage if the 12 years' period for the recovery of the money on the prior mortgage has expired, because it would not be to his advantage to do so. But as the property should be sufficient for all the incumbrances on it, if the property were sold under the first mortgage there should be no loss to the subsequent mortgagees. So long as the right of a mortgagor or a puisne mortgagee to enforce the security of the prior mortgagee by virtue of subrogation under present section 92 or old section 74 of the Transfer of Property Act is based only upon the right of the prior mortgagee to enforce his security, he has to act within the same period as is allowed under the law to the prior mortgagee.

He acquires a right to sue only when he pays off the prior mortgage, but thereby he does not acquire a new cause of action beyond what the prior mortgagee had. Within 12 years given to him he has to make up his mind as to whether he would redeem the prior mortgage to be subrogated to the prior mortgagee's right or not.

In *Gopi Narain Khauna v. Bansidhar* (1) their Lordships observed that although the form of decree for foreclosure prescribed by section 86 of the Transfer of Property Act, 1882, contemplates a suit between one mortgagee and the mortgagor only, it should in practice

(1) (1905) I.L.R., 27 All., 325.

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be adapted to the particular circumstances of each case and provide in the case of puisne incumbrancers for the exercise of successive rights of redemption and for working out the rights of parties in the event of redemption by any one of them. So if the prior mortgagee brings a suit when the 12 years' period is about to expire, the puisne mortgagee should take care to get the decree properly drafted in the light of these observations for which forms Nos. 9 and 10 have been provided in Appendix D.

The mortgagee's interest is only to recover his money from the property which he would get if the security is sufficient. Ordinarily it is in the interest of the mortgagor to save the property if the encumbrances on it do not exceed its value. The preliminary decree is primarily for the benefit of the mortgagor. If he is inclined and thinks it his interest to save the property from sale and pays off the encumbrance, he would have a right of reimbursement from his co-mortgagors under section 69 of the Contract Act, for which he would have three years from the date of payment if the period for enforcing the security has expired.

The right to reimbursement should not be confused with the right to enforce a security by virtue of subrogation. These rights stand on different grounds. The person who claims the right to reimbursement enforces it in his own right, and not in the right of another. We are not concerned with this right here. The right to enforce a security by virtue of subrogation is a right which equity concedes to a person and it is a right to demand the performance of the original obligation and the application thereto of all securities held by the creditor. It is a claim which is enforced in the right of the original creditor, and only because the person claiming it becomes clothed with the rights and powers of the original creditor. The subrogee is an assignee in equity and he cannot stand on a better footing than an assignee at law. If a creditor assigns his security for

valuable consideration to a person who thereupon sues upon the security, it cannot be urged that though the right to enforce the security in the hands of the creditor may be barred by limitation, the assignee may proceed to enforce it if he brings his suit within 12 years from the date of assignment. The right to enforce the security in his own name arises on the date of assignment, but the limitation which has already commenced to run will not cease to operate just because the creditor has assigned the security to another. A subrogee, whose position is that of an equitable assignee, cannot be better. He can enforce the security in the right of the creditor and therefore subject to the law of limitation that would affect the creditor.

My answer therefore is in the negative.

BY THE COURT:—The answer to the question referred to by the Bench is in the affirmative.

### APPELLATE CIVIL

*Before Mr. Justice Collister and Mr. Justice Bajpai*

WALI MUHAMMAD AND OTHERS (OPPOSITE PARTIES) *v.*

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*Provincial Insolvency Act (V of 1920), sections 5, 75—Creditor's petition for adjudication dismissed—Death of debtor pending creditor's appeal in district court—Order of district court that case should proceed against debtor's legal representatives—Whether appeal lies—Revision—Civil Procedure Code, sections 4, 115.*

A creditor's petition for adjudication of a debtor as an insolvent was dismissed, and the creditor appealed to the District Judge. During the pendency of the appeal the debtor died, and the District Judge ordered, under section 17 of the Provincial Insolvency Act, that the proceedings should continue against the legal representatives of the deceased debtor. Against this order the legal representatives filed an appeal in the High Court:

\*Second Appeal No. 6 of 1933, from an order of I. B. Mundle, District Judge of Saharanpur, dated the 25th of February, 1933.



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*Held*, that a clear distinction was drawn between a "decision" and an "order" by section 75(1) of the Provincial Insolvency Act, and as by the second proviso an appeal was allowed only against a decision of the district court, the present appeal, which was only against an interlocutory order passed in the course of the appeal pending in the district court, did not lie.

*Held*, further, that the order could not be interfered with in the exercise of revisional jurisdiction. The powers conferred by the first proviso to section 75(1) would be exercisable if the order had been an order made by the court below in an appeal decided by it, but no appeal had yet been decided by the court below. Nor were the powers conferred by section 115 of the Civil Procedure Code exercisable; for, the powers given to High Courts by section 5(2) of the Provincial Insolvency Act were expressly subject to the provisions of that Act, and as that Act specifically provided by section 75 for appeals and revisions in a particular manner, any action taken under section 115 of the Civil Procedure Code would be in contravention of the provisions of that Act. Further, according to section 4 of the Civil Procedure Code, inasmuch as the Provincial Insolvency Act was a special law its provisions could not, in the absence of any specific provision to the contrary, be affected in any way by the Civil Procedure Code.

Mr. *Shiva Prasad Sinha*, for the appellants.

Mr. *G. S. Pathak*, for the respondent.

COLLISTER and BAJPAI, JJ.:—The facts of this case might be briefly stated. One Lala Hingan Lal, a creditor, applied for the adjudication of Wazir Ali as an insolvent in the court of the Subordinate Judge of Saharanpur who had insolvency jurisdiction. The application of the creditor was dismissed. He filed an appeal in the court of the District Judge and during the pendency of the appeal Wazir Ali died. An application was made by the creditor for bringing the heirs of Wazir Ali on the record and the learned District Judge observed that section 17 of the Provincial Insolvency Act applied and that the appeal would not abate. He directed that the case would proceed against the legal representatives of the deceased respondent. A second appeal has been preferred against this order by the legal representatives of Wazir Ali.

A preliminary objection has been taken on behalf of the respondent that no second appeal lies, and when it was pointed out that the High Court has very extensive powers in revision it was submitted that a revision also did not lie. In order to consider the merits of the preliminary objection we have got to interpret section 75 of the Provincial Insolvency Act. The first clause provides that the debtor, any creditor, the receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a court subordinate to a district court may appeal to the district court, and the order of the district court upon such appeal shall be final. It is said that the policy of the legislature is that an *order* of the district court upon the appeal would be final, and under the second proviso an appeal can be preferred only against the *decision* of the district court. There is a clear distinction between a decision and an order, as is apparent from a reading of sub-clause (1). So far as the appeal is concerned, the contention is that the district court in the present case has not arrived at any decision but has only passed an interlocutory order impleading the legal representatives of the deceased respondent and therefore no second appeal lies. We are of the opinion that there is considerable force in this contention and it is not possible for us to entertain the present proceedings as an appeal.

It was then submitted by learned counsel for the appellants that we should interfere with the order of the court below in our revisional jurisdiction. The first proviso to section 75, clause (1) says that the High Court, for the purpose of satisfying itself that an order made in any appeal decided by the district court was according to law, may call for the case and pass such order with respect thereto as it thinks fit. Before we can call for the case and pass appropriate orders we must be satisfied that the order complained of is an order made by the court below *in any appeal decided by it*. The objection of counsel for the respondent is that the appeal has not

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so far been decided by the district court and as such it is not possible for us to interfere with the order of the court below. Here again the objection of the respondent seems to be well founded.

On behalf of the appellants reliance was placed on the case of *Abdul Razah v. Basiruddin Ahmed* (1). Their Lordships observed that where an appeal has been preferred against an order refusing the appellant's application to be declared an insolvent, the High Court has power in the exercise of its inherent jurisdiction as a court of appeal to make an *ad interim* order for the protection of the appellant and for the appointment of a receiver of his assets during the pendency of the appeal. We think that this case has no application inasmuch as there is no question here of the inherent power of the High Court to pass suitable orders in any miscellaneous proceeding that might come before the High Court in connection with the appeal pending before it. The next case that was brought to our notice was the case of *Nagindas Bhukhandas v. Ghelabhai Gulabdas* (2). The learned Judges of the Bombay High Court held that on an appeal from a sentence of imprisonment under section 43 of the Provincial Insolvency Act the High Court has power, under order XLI, rule 5 of the Civil Procedure Code read with clause (2) of section 47 of the Provincial Insolvency Act, to suspend the sentence until the appeal is disposed of. Here also there was an appeal pending in the High Court and an application was made for the suspension of a sentence passed by the court below and it was held that the provisions of the Civil Procedure Code might be invoked in order to afford protection. The case which is really in point is the case of *Gangadhar v. Shridhar* (3). The learned Additional Judicial Commissioner of Nagpur observed as follows: "The Provincial Insolvency Act V of 1920 was in force when the present application was made and I must consider that

(1) (1910) 14 C.W.N., 586.

(2) (1910) 56 Indian Cases, 449.

(3) (1920) 61 Indian Cases, 589.

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the application was made under the first proviso to section 75 (1) of that Act. But the order of the district court does not dispose of the appeal and consequently the proviso to section 75(1) has no application. But as no order has been passed by the district court *upon the appeal* the provision in section 75(1) that such an order would be final has likewise no application. The powers given to High Courts by section 5(2) of Act V of 1920 are subject to the provisions of that Act, but there is no provision which states that an interlocutory order is final. The High Court has power to set aside an interlocutory order passed in a civil suit. It has therefore power to set aside the order which I am asked to revise." We agree that in terms there is nothing in section 75, clause (1), which would make the order complained of final because it is not an order passed upon an appeal, but at the same time we, with respect, differ from the view of the Nagpur court that we could interfere with the present order under the Code of Civil Procedure. The provision on which reliance is placed is contained in section 5 of the Provincial Insolvency Act. That section says that subject to the provisions of this Act High Courts and district courts, in regard to proceedings under this Act in courts subordinate to them, shall have the same powers and shall follow the same procedure as they respectively have and follow in regard to civil suits. It is said that we could interfere with the order of the court below under section 115 of the Civil Procedure Code. The answer to that is that the High Court has power to act under the Code of Civil Procedure only subject to the provisions of this Act. Where therefore the Insolvency Act specifically provides for appeals and revisions in a particular manner, any action taken by us under the Code of Civil Procedure will not be subject to the provisions of the Insolvency Act but will be in contravention of those provisions. Reference was made by learned counsel for the respondent to section 4 of the

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Code of Civil Procedure, which says that in the absence of any specific provision to the contrary nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force. The Provincial Insolvency Act is a special law and in the absence of any specific provision to the contrary the Code of Civil Procedure cannot limit or otherwise affect the provisions of the Insolvency Act. We are, therefore, of the opinion that it is not possible to interfere with the order of the court below under any provision of the Code of Civil Procedure when a distinct procedure is prescribed in the Provincial Insolvency Act.

At one stage it was argued on behalf of the appellants that the order of the court below could be interfered with in appeal inasmuch as the order is a decision of the district court. We cannot agree with this contention because a distinction has been drawn by the Act between a decision and an order. The word "decision" has an element of finality so far as a particular court is concerned and an interlocutory order of a court cannot be said to be a decision of that court.

For the reasons given above we sustain the preliminary objection and dismiss this appeal with costs.

### REVISIONAL CRIMINAL

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and  
Mr. Justice Bennet*

EMPEROR v. MOHRU LAL\*

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November, 4

*Criminal Procedure Code, sections 179, 181—Jurisdiction—Place of trial—Criminal misappropriation—Indian Penal Code, section 405—Agent of Cawnpore firm sent to sell goods in Bengal and to remit the money to Cawnpore—Agent absconding and failing to remit the money—No evidence to show where the money was actually misappropriated.*

\*Criminal Reference No. 478 of 1935.

Section 405 of the Indian Penal Code, which defines criminal breach of trust, falls into two parts. The first part will apply where it is known that the accused has dishonestly misappropriated or converted to his own use the entrusted property at a particular place, and the jurisdiction to try the accused will be at that place. But where it can not be alleged that the misappropriation was actually and definitely committed at any particular place, there the case comes under the second part of section 405, namely dishonestly disposing of the property in violation of any direction of law or of any legal contract; and if the legal contract required that the accused should remit or deliver or otherwise dispose of the property at a particular place, then his failure to do so constitutes the offence, and the jurisdiction to try the accused exists at such place. Hence, if there is evidence apart from the fact of non-delivery or non-accounting to show where the misappropriation was committed, the trial may be held at that place; but if there is no evidence to show where the misappropriation was committed, other than the fact of non-delivery or non-accounting according to the contract, then the trial may be held at the place where the accused failed to deliver or to account, because that is where the offence was committed.

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So, where the accused was engaged in Cawnpore as an agent of a firm of Cawnpore to sell goods in Bengal and either bring or remit the money to Cawnpore; and the accused made some sales and realised the prices at some places in Bengal but failed to bring or remit the money to Cawnpore; and there was no allegation or evidence that the accused had actually misappropriated or converted to his own use the money by any definite act committed at any particular place: *Held*, that the Cawnpore court had jurisdiction to try him for an offence under section 408/409 of the Indian Penal Code.

Messrs. *P. L. Banerji* and *V. D. Bhargava*, for the accused.

Dr. *K. N. Katju* and Messrs. *Saila Nath Mukerji*, *I. B. Banerji* and *Shri Ram*, for the complainant

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

SULAIMAN, C.J., and BENNET, J.:—This is a reference by the learned Sessions Judge of Cawnpore of the case of *King-Emperor v. Mohru Lal* under section 408/409

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of the Indian Penal Code, on the ground that the Magistrate of Cawnpore has no jurisdiction to try this case. The charge as actually framed by the Magistrate is that Mohru Lal between the dates of the 10th of May and the 18th of December, 1934, being a factor or broker, servant or agent of Matadin Bhagwan Das did commit criminal breach of trust in respect of Rs.19,013-5-9 and committed an offence under section 408/409 of the Indian Penal Code. The Magistrate has omitted to put the place of occurrence of the offence. For the accused it is contended that the allegations of the complainant amount to a charge of a commission of an offence somewhere in Bengal and that the Cawnpore court has no jurisdiction to try such an offence. For the complainant the allegation is that the offence can be inquired into in Cawnpore and that the Cawnpore court has jurisdiction. The allegations in the complaint are that the accused was engaged in Cawnpore as an agent of the firm of Matadin Bhagwan Das, sugar merchants of Cawnpore, and that the accused was sent to Bengal with instructions to effect deliveries of sugar bags and to realise the price of goods from customers and either personally bring the proceeds to Cawnpore or remit the money to Cawnpore, that accused did remit large sums to Cawnpore and that the latest date of such remittance was the 7th of December, 1934, and that "subsequently he withheld the moneys collected by him and embezzled". In paragraph 7 of the complaint the names of nine purchasers are given and the total amount paid by these purchasers Rs.19,099, and the allegation is made that the accused realised these amounts and embezzled the sums. The evidence given on behalf of the complainant showed that these sums had been realised by the accused. It was further shown that the accused absconded and could not be traced. There was no evidence given on behalf of the complainant nor was any allegation made that the accused had actually misappropriated or converted to his own use this money

by any positive act. The allegations and evidence of the complainant were that the accused had collected this money and had failed to send it to Cawnpore within a reasonable time. It was also shown that certain of the sums of money in question had been collected by the accused prior to his last remittance on the 7th of December, 1934, and therefore the argument was that the accused had misappropriated these sums of money.

The point of jurisdiction has been argued before us at great length and learned counsel has contended that the offence, if any, must be taken to have been committed in Bengal. It is contended by learned counsel that this case might be tried at any of the places in Bengal where it is shown that the accused had collected money. One objection to such an argument is that the mere collection of the money did not amount to a criminal offence. The accused may have been perfectly innocent when he collected this money and his criminal offence occurred later when he failed to remit the money or to bring it to Cawnpore. Now there are various rulings, on which learned counsel relies, of the Calcutta High Court. The earliest of these is *Gunananda Dhone v. Santi Prakash Nandy* (1). In that ruling a Bench, of which MUKERJI, J., was a member, laid down two propositions; (1) that where there was an accused person bound to render accounts, the court which had jurisdiction at the place where the accounts were to be rendered had jurisdiction for an offence of criminal breach of trust, and (2) that such jurisdiction existed even where there was clear evidence of embezzlement in another place. Later rulings dissented from this latter proposition, and in *Pascal v. Raj Kishore Mathur* (2) a Bench of two Judges including the learned CHIEF JUSTICE threw doubts on the correctness of the decision in *Gunananda Dhone v. Santi Prakash Nandy* (1), but in this case the Bench did not interfere with the continuance of the trial before the

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(1) A.I.R., 1925 Cal., 613.

(2) A.I.R., 1931 Cal., 521.



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Magistrate in Calcutta. There is again a ruling against the applicant, in *Paul de Flondor v. Emperor* (1). The ruling proceeds on page 98 to quote a decision in *Reg. v. Davison* (2) where Baron ALDERSON stated: "Where there is no evidence of fraudulent embezzlement, except the non-accounting, the venue may be laid in the place where the non-accounting occurred, because the jury may presume that there the fraudulent misappropriation was made, but this cannot apply where there is distinct evidence of the misappropriation elsewhere." Further, on page 99 it was laid down: "Embezzlement, according to English common law, is committed, and can be tried in the place where the accused misappropriated the money, or if there is no evidence of embezzlement except the non-accounting, then in the place where he ought to have accounted and failed to do so, or accounted falsely, or refused to account, or denied the receipt of the money." Now the learned Judges of the Calcutta High Court went on to say: "But whatever be the effect of the English decisions and statutes, they are not in point. So far as India is concerned, the Code of Criminal Procedure, in sections 177 to 189, provides the appropriate venue. It has been settled law for many years that section 179 does not apply to charges of misappropriation." And reference was also made to section 181(2). Now we are of the opinion that the learned Judges in referring to these provisions of sections 179 and 181 missed the point in regard to this particular offence. In our view the essence of the English common law is that the offence itself may involve the commission of an offence at a place where there is a failure to render accounts. Sections 179 and 181(2) of the Criminal Procedure Code are sections which in various circumstances extend the jurisdiction of the courts beyond the place where the offence is actually committed. What we have to see in regard to this offence of criminal breach

(1) (1931) I.L.R., 59 Cal., 92.

(2) (1855) 7 Cox.C.C., 158.

of trust is where the offence was actually committed. Section 177 of the Criminal Procedure Code lays down a rather obvious proposition that the court where the offence is committed has jurisdiction to try the offence, but that section and the subsequent sections do not indicate which is the court where the offence is committed. That point has to be determined from the definition of the offences in the Indian Penal Code.

Now when we come to the particular offence in question we find that section 405 is as follows: "Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'."

This section falls into two parts. The first part is a positive part and deals with dishonest misappropriation or conversion of property. To charge a person under this part of the section there should be an allegation that at a particular time and place that person has dishonestly misappropriated or converted to his own use property which was entrusted to him. Now the second part of the section may be a negative part. It consists of dishonestly using or disposing of property in violation of (a) any direction of law, or (b) any legal contract touching the discharge of the trust. Where there is a violation of a direction of law or a legal contract, the proof of that violation may be by negative evidence that the direction of law or the contract has not been fulfilled. We are of opinion that where the direction of law or the contract requires that the accused should dispose of the property at a particular place, then the court having jurisdiction at that place will have jurisdiction to try the offence of the second part of section 405 of the Indian Penal Code

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where there is a charge that the accused has failed to comply with the direction of law or the legal contract and has failed to carry out his duty at that place. The first part of section 405 will apply where it is known that the accused has dishonestly misappropriated or converted to his own use certain property at a particular place, and the jurisdiction to try the accused will be at the place where that dishonest misappropriation or conversion has taken place. But where it is alleged that the accused has failed to account for the property, then the second part of section 405 will apply and jurisdiction exists at the place where the property should have been delivered by the accused. / In *Paul de Flondor v. Emperor* (1) the court has laid down: "If there is evidence apart from the fact of non-accounting to show where the misappropriation was committed, the venue must be laid either in that place or in the place where the property was received or retained. If there is no evidence to show where the misappropriation was committed, other than the fact of non-accounting, then the venue may be laid in the place where the accused failed to account, because that is where the offence was committed within the meaning of section 181(2): *Reg. v. Davison* (2)." The latter portion of this observation is against the applicant in revision.

In *Niwasilal Modi v. Routhmull* (3) there was no duty to pay the money at Calcutta. The accused was employed by a Calcutta firm to manage a branch in Behar and his duty was to write up the books of the branch in Behar and to credit the money received to the firm in Behar. The accused was called to Calcutta to explain his accounts and he was unable to explain his accounts. It was held that the mere fact of being unable to explain his accounts in Calcutta did not give the Calcutta court jurisdiction. This ruling will not help the applicant because in the present case there was a duty to pay the money at Cawnpore.

(1) (1931) I.L.R., 59 Cal., 92(100). (2) (1855) 7 Cox.C.C., 158.  
(3) A.I.R., 1931 Cal., 532.

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In *Prokash Chandra Sircar v. Mohim Chand Haldar* (1) there was a ruling of a Bench of which MUKERJI, J., was again a member and it was held that where there was no definite allegation of misappropriation at any particular place, but the accused had a duty to remit the money which he realised to Calcutta and the accused failed to remit the money to Calcutta, then the Calcutta court had jurisdiction.

In *In re Jivandas Savchand* (2) the accused was employed in Rangoon and he was charged with falsifying the accounts at Rangoon. He was employed by a firm in Bombay but he had no duty to remit the money to Bombay. His duty was to send to Bombay weekly statements of the accounts of the business transacted in Rangoon. It was held that the Bombay court had no jurisdiction to try the offence of criminal breach of trust. This again was a case where there was no duty to remit money to Bombay.

In *Re Rambilas* (3) there were certain brokers of Bombay charged with having committed criminal breach of trust in Bombay in respect of certain hundis sent to them at Bombay by the complainants who resided within the jurisdiction of a Magistrate of Erode in Madras. It was held that the court at Erode had no jurisdiction to try the offence and the argument centred on section 179 of the Criminal Procedure Code on the ground that the criminal breach of trust in Bombay occasioned wrongful loss to the complainants in Erode. Learned counsel bases his argument on a mere *obiter dicta* at the bottom of page 641 and at the top of page 642 as follows: "In the first place the present case falls under the first, and not the second, part of the section (405); the complaint clearly charges dishonest misappropriation to accused's own use, and not use or disposal in violation of law or contract. Secondly, if it were otherwise, the offence would be committed where the dishonest use or disposal took place, not where the contract was made or should

(1) A.I.R., 1934 Cal., 392.

(2) (1930) I.L.R., 55 Bom., 59.

(3) (1914) I.L.R., 38 Mad., 639.

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have been performed." This mere *obiter dicta* is of no weight.

In *Aya Ram v. Gobind Lal Verma* (1) a single Judge remitted a case for further evidence which would show where the jurisdiction lay. We do not think that any weight can be assigned to his observations.

In *Mahtab Din v. Emperor* (2) there was a ruling of the learned CHIEF JUSTICE sitting alone. It was a case of a merchant at Karachi who should have remitted accounts and sale proceeds to Lyallpur in the Punjab, but he retained the sale proceeds at Karachi. The retention at Karachi was known and the case then fell under the first part of section 405.

In *Ali Mohamed Kassim v. King-Emperor* (3) there was a case where the accused misappropriated the money by gambling at a certain place in the Shan States. He had to render accounts at Mandalay, but it was held that this did not give the Mandalay court jurisdiction. This was a case falling under the first part of section 405 of the Indian Penal Code.

We now turn to the rulings of this High Court.

In *Queen-Empress v. O'Brien* (4) Sir JOHN EDGE, C.J., had before him a case in which the accused was employed by a company of Cawnpore to sell goods in Bengal and the company ordered him to return the goods or the sale proceeds and the accused failed to comply. The Court held that the Cawnpore court had jurisdiction. It is true that the judgment was partly based on the consequence of loss of the value of goods arising to the employers at Cawnpore and this view of the law is not now good law. A similar view was taken by RAFIQ, J., in *Langridge v. Atkins* (5).

In *Emperor v. Mahadeo* (6) TUDBALL, J., had a case where the accused was employed by a firm in Mirzapur to take goods for sale to districts in Lower Bengal and sell the goods and remit the money to his employers in

(1) A.I.R., 1933 Lah., 559.

(3) (1931) I.L.R., 9 Rang., 338.

(5) (1912) I.L.R., 35 All., 29.

(2) A.I.R., 1924 Lah., 663.

(4) (1896) I.L.R., 19 All., 111.

(6) (1910) I.L.R., 32 All., 397.

Mirzapur. When called on to furnish accounts he failed to do so. It was held that there was jurisdiction in Mirzapur.

In *Ganeshi Lal v. Nand Kishore* (1) KARAMAT HUSAIN, J., held that the Cawnpore court did not have jurisdiction where an agent of a Cawnpore firm was in charge of a branch shop in Sultanpur and he misappropriated money belonging to his principal which should have been sent to the head office at Cawnpore, because the offence of misappropriation was actually and definitely committed at the branch shop. "When the complainant was examined he distinctly stated that the accused misappropriated the money belonging to the branch firm at Gauriganj." This view of the law that in these cases section 179 of the Criminal Procedure Code will entitle a court to have jurisdiction on the ground that wrongful loss is caused to the complainant and that wrongful loss is a consequence of the criminal act within the meaning of section 179 is a view which has been held to be incorrect by a Full Bench of this Court in *Emperor v. Kashi Ram Mehta* (2). In that ruling it was observed by the learned CHIEF JUSTICE on page 1056: "It may also be pointed out that where it is the duty of an agent not only to return specific goods to his principal but to account for that and to render accounts, the offence of misappropriation may not be committed till he has the dishonest intention of causing wrongful loss to his master and wrongful gain to himself, and, therefore, it may not possibly come into existence till ultimately he refuses either to render account or to pay the balance due. This may happen not only at the place where he received money but at the place where he is employed or his master resides."

We may also refer to a brief ruling of a Full Bench of this Court in *Sheo Shankar v. Mohan Sarup* (3). In that case a servant of a shop at Mirzapur was sent to collect

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(1) (1912) I.L.R., 34 All., 487. (2) (1934) I.L.R., 56 All., 1047.

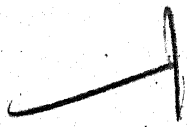
(3) (1920) 19 A.L.J., 69.

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money from two villages in Allahabad district and he failed to bring the money to Mirzapur and alleged that he had been robbed in Allahabad district. It was held that the Mirzapur court had jurisdiction to try him for criminal breach of trust. We consider that the basis of the decision is contained in the sentence: "Accused No. 1 was the servant of the complainant and had a duty to account to his master at the shop at Mirzapur."

Having considered all these rulings we are of opinion that the propositions in regard to jurisdiction for cases falling under section 405 enunciated by us in the earlier part of this judgment are correct. On that view of the law, in the present case the Magistrate at Cawnpore had jurisdiction because the allegations in the complaint are that the accused withheld money collected by him and did not forward it to Cawnpore. There is no charge that he misappropriated or converted to his own use the money at any particular place and his offence consists in failing to carry out his contract and remit the money or bring the money to Cawnpore. He was guilty of an illegal omission. Section 43 of the Indian Penal Code lays down that a person is said to be "legally bound to do" whatever it is illegal in him to omit. He was legally bound to remit this money to Cawnpore and he failed to do so. He therefore committed an offence within the jurisdiction of the Magistrate in Cawnpore by his illegal omission to send or bring the money to Cawnpore. We consider therefore that the Magistrate at Cawnpore had jurisdiction to try this case.

We accordingly refuse this reference and direct that the record be returned to the Magistrate through the learned Sessions Judge.



## APPELLATE CIVIL

*Before Mr. Justice Collister and Mr. Justice Bajpai*

SHANKAR LAL (OPPOSITE-PARTY) *v.* ALI AHMAD AND  
ANOTHER (APPLICANTS)\*

1935  
November, 5

*Provincial Insolvency Act (V of 1920), section 38—Insolvent's proposal for a composition—Acceptance by the prescribed majority of creditors is a condition precedent to the court's considering the proposal—Court cannot sanction proposal in the absence of such acceptance by creditors.*

Where an insolvent submits, under section 38 of the Provincial Insolvency Act, a proposal for a composition in satisfaction of his debts, the acceptance of the proposal by a majority in number and three-fourths in value of the creditors, as prescribed by clause (2) of the section, is a condition precedent before the court can proceed to consider the proposal. A composition in its essence is an agreement; and unless the proposal of the insolvent is duly accepted by the creditors in the manner laid down by clause (2) there is no agreement; and consequently there is no proposed composition before the court for its consideration and either approval or refusal. Therefore, in the absence of acceptance by the creditors as prescribed by clause (2), the court cannot approve the proposal for composition.

Messrs. B. Malik and Jagdish Swarup, for the appellant.

Messrs. S. N. Verma, Sri Narain Sahai and S. Majid Ali, for the respondents.

COLLISTER and BAJPAI, JJ.:—This appeal is connected with revision No. 156 of 1934 and the same question of law is raised in both proceedings. It appears that one Hakim Syed Ali Ahmad was adjudged an insolvent in 1910. In the year 1930 he applied under section 35 of the Provincial Insolvency Act for annulment of adjudication, but his application was dismissed and the dismissal order was maintained up to the High Court. In those proceedings the insolvent made an attempt to obtain a reduction in the contractual rate of

\*Second Appeal No 4 of 1934, from an order of Ali Muhammad, District Judge of Agra, dated the 9th of November, 1933.

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interest on his debts and it was held by the learned District Judge that "An application under section 35 is something quite different; the court is not functioning as a distributor of assets at all. It is therefore no part of the court's duty to start calculating what rate of interest ought to be paid to each creditor. Before the debtor can ask the court to annul the order of adjudication he has to prove to the court that he has paid up his total debts *in full* including all the interest up to the date of payment that he had contracted to pay to each creditor."

Having failed in his attempt to obtain a reduction of interest under section 35, the insolvent submitted a proposal for a composition in satisfaction of his debts under section 38 of the Act. He proposed to pay all his debts, but expressed his willingness to pay interest at 3 per cent. per annum only. On this, notice was sent to the creditors under sub-clause (1) and the creditors in a body opposed the proposal and demanded interest at the contractual rate from the date of the adjudication. The trial court accepted the proposal of the insolvent with a modification inasmuch as it ordered the payment of interest from the date of the adjudication at 4 per cent. per annum. Certain creditors appealed against the order of the trial court, but the learned District Judge dismissed the appeals and the matter has come before us in these two connected proceedings.

It is contended on behalf of one of the creditors that the order of the court on the application of the insolvent under section 35 refusing to reduce interest operates as *res judicata*. We are of opinion that proceedings under section 38 are not allied to proceedings under section 35, for whereas in the latter case the insolvent has to show that the debts have been paid in full, which implies that the debts have been paid along with interest at the contractual rate, section 38 contemplates a proposal for a composition in satisfaction of debts and implies a reduction in the claim of the creditors.



The main objection, however, is that the proposal of the insolvent for paying a lesser rate of interest than the contractual rate was objected to by all the creditors in a body and the court thus had no option but to refuse to give its approval to the proposal. The case for the insolvent is that under sub-clause (7) the court has very wide powers either to approve or to refuse the proposal, and although certain restrictions might have been laid down in sub-clauses (4), (5) and (6) under which the court has no option but to refuse the proposal, there is no restriction to the inherent power of the court because of anything contained in sub-clause (2). It is said that even if a majority in number and three-fourths in value of all the creditors whose debts are proved and who are present in person or by pleader refuse to accept the proposal, the court has the power to approve the same, and this is the view which has found favour with the court below. Support for this view was sought from the case of *Ganga Sahai v. Mukarram Ali Khan* (1). It is necessary at this stage to consider the provisions of section 38 of the Insolvency Act of 1920, but before we do so we might mention that the English Bankruptcy Acts form the basis of Indian insolvency legislation from their earliest times to the enactment of Act V of 1920, and if we look at the English Bankruptcy Act of 1914, there can be no doubt that the court's power to look at the proposal commences after the acceptance of the proposal by the general body of creditors. Section 16 of the English Act relates to composition or scheme of arrangement and there a debtor who intends to make a proposal for a composition in satisfaction of his debts has to apply to the official receiver, who calls a meeting of the creditors, and if at that meeting a majority in number and three-fourths in value of all the creditors who have proved resolve to accept the proposal, it shall be deemed to be duly accepted by the creditors. It is

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(1) (1925) 24 A.I.J., 441.



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also open to the debtor at the meeting to amend the terms of the proposal if the amendment is in the opinion of the official receiver calculated to benefit the general body of creditors. After all these formalities have been complied with, the debtor or the official receiver may, *after the proposal is accepted by the creditors*, apply to the court to approve it and notice of the time appointed for hearing the application is given to each creditor who has proved. The English Act then lays down various principles of guidance for the court which considers the proposal of the debtor (accepted of course by the creditors), more particularly for refusing the proposal, and in sub-clause (11) says that in any other case the court may either approve or refuse to approve the proposal.

The Indian Act of 1920 in all material particulars agrees with the English Bankruptcy Act, only that under the Indian Act the application under section 38 can be made by an insolvent only after the making of an order of adjudication and differs to this extent that the application has to be made to the court and not to the official receiver, but the underlying principle is the same and the scheme of the Act is also the same. The proposal of the insolvent is not to be deemed to be duly accepted by the creditors unless a majority in number and three-fourths in value of all the creditors whose debts are proved and who are present in person or by pleader resolve to accept the proposal. A composition in its essence is an agreement, and agreement has been defined in sub-clause (2) as an acceptance by a majority in number and three-fourths in value of all the creditors. Unless therefore this condition is satisfied the proposal cannot be deemed to be duly accepted; the proposal cannot be said to have reached the stage of agreement or a composition and there cannot therefore be a proposal for a *composition* before the court for its consideration or acceptance.

The acceptance by a majority and three-fourths in value of all the creditors seems to be a condition

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precedent before the court can proceed to consider it. This undoubtedly is the case in the English Bankruptcy law and there is nothing in the language of the Indian law to suggest that a departure was intended. The debtor is, of course, given the option before the proposal is placed before the creditors at the meeting to amend the proposal if the amendment is in the opinion of the court calculated to benefit the general body of creditors. Under sub-clauses (4), (5) and (6) the court is told that if the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, or if under certain circumstances reasonable security for payment of not less than six annas in the rupee is not provided for, or if certain priority is not safeguarded, the court shall necessarily refuse the proposal. The Act then says that in any other case the court may either approve or refuse to approve the proposal. It follows therefore that the conditions laid down in sub-clauses (2), (4), (5) and (6) must be fulfilled before a court can approve the proposal.

It is, however, argued that when the legislature has given complete details of the conditions on which a proposal is to be refused, including the condition that the terms of the proposal ought to be reasonable and calculated to benefit the general body of creditors, it is almost impossible to imagine a case where a court can refuse to approve the proposal on any other ground. But it is possible to think of a case where the court might feel inclined to refuse a proposal on other grounds, where, for instance, the scheme is in disregard of the demands of commercial and public morality or of justice. The conduct of the insolvent in connection with the insolvency might also be taken into consideration and the scheme might only be a device to enable the insolvent to buy back his own assets at a profitable figure and to make a profit out of his insolvency. It is therefore not impossible to think of a case where the

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court will not give its sanction to a proposal even if it is not opposed to sub-clauses (4), (5) and (6), and the case of *Sevugan Chettiar v. Murugappa Chettiar* (1) might be cited as one of such cases.

We now propose to consider the cases that have been cited before us at the Bar. In the Madras case just referred to, although the point for decision was a different one, the learned Judges observe at page 828 as follows: "Under our own Provincial Insolvency Act section 38 restricts the power of the court to approve a composition scheme by certain conditions. If those restrictive conditions are fulfilled, the last clause of the section provides that the court may then either approve or disapprove of the scheme. That means that, although the section has provided that no scheme shall be approved *unless the requisite majority of the creditors consent*, still, even if there is that consent of the creditors, the court must exercise its judicial discretion before approving of the scheme." The learned Judges in this passage clearly mean to hold that the scheme will not be approved unless the requisite majority of the creditors consent.

In *Shafiq-uz-zaman v. Deputy Commissioner, Bara Banki* (2) the learned Judicial Commissioners commented on the provisions of section 27, Act III of 1907 (corresponding to section 38 of Act V of 1920) and observed that the first step was to bring the scheme to the notice of the creditors and the next step was to ascertain their views at a meeting convened under the provisions of the section and if a majority in number and three-fourths in value of all the creditors whose debts are proved and who are present in person or by pleader resolve to accept the proposal, the court notes that the proposal is duly accepted by the creditors. They then go on to say: "But if on a consideration of the proposal there is not a majority in number and

(1) (1930) I.L.R., 54 Mad., 823.

(2) (1915) 18 Oudh Cases, 125.

three-fourths in value of all the creditors whose debts are proved and who are present in person or by pleader in favour of the acceptance of the scheme, the proposal will stand rejected, whatever be the opinion of the court as to its merits." This case fully supports the contention of the appellants and the view which we ourselves have taken of the matter.

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It now remains for us to consider the case on which reliance was placed by the trial court. In that case, *Ganga Sahai v. Mukarram Ali Khan* (1), the point was whether under section 38 of the Insolvency Act the debtor was entitled to ask the court for a scrutiny into the scheduled debts, and while considering that point SULAIMAN, J., at page 442 observed in passing that "If a majority in number and three-fourths in value of all the creditors, whose debts were proved, resolve to accept the proposal, it is deemed to be duly accepted. If they do not, then, unless the proposal contravenes the provisions of sub-clauses (4), (5) or (6), the court has power to approve of it." BOYS, J., at page 451 said: "But I am unable to find in the terms of section 38 any limitation whatsoever of the nature of the proposal which the Judge may entertain, subject only to this that he shall consider it reasonable and to the general benefit of the creditors." If this last passage were taken literally and to have a bearing on the point at issue before us, it would mean that the limitations contained in clauses (5) and (6) do not exist, and it is obvious that the learned Judge was not laying down any general principle but was referring to the matter in controversy before him in that particular case. So far as the observations of the other learned Judge are concerned we are of opinion that they are a pure *obiter* inasmuch as it was not necessary to consider that particular point in the case before him. We feel that we are therefore in no way bound by the observations contained in that case and on a

(1) (1925) 24 A.L.J., 441.

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proper interpretation of section 38 the fulfilment of the conditions laid down in sub-clause (2) is a condition precedent to the acceptance of the proposal by the court. For the reasons given above we allow this appeal with costs against the insolvent, set aside the order of the court below and dismiss the insolvent's application under section 38.

### FULL BENCH

*Before Mr. Justice Thom, Mr. Justice Niamat-ullah and  
 Mr. Justice Bennet*

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BRIJMOHAN LAL AND ANOTHER (PLAINTIFFS) v. HAZARI  
 LAL AND OTHERS (DEFENDANTS)\*

*Easements Act (V of 1882), sections 5, 13—Continuous easement  
 —Flowing sewage water from plaintiff's house along drains  
 in defendant's house.*

An easement consisting of a right to flow sewage water from latrines in plaintiff's house along drains in the defendant's house or land is a continuous easement.

The definition of an easement in section 4 of the Easements Act as a right to do and continue to do something on the servient tenement makes it clear that the "act of man" mentioned in the definitions of a continuous easement and a discontinuous easement in section 5 has reference to an act which has to be done on the servient tenement. The sewage water comes into existence by act of man done on the dominant tenement, but so long as the water flows in the plaintiff's land there is no exercise of easement; it is only when the water enters the defendant's drain that the exercise of easement begins but thereafter there is no act of man and the water flows along the defendant's drain by force of gravity, unless the drain has been obstructed.

Dr. N. P. Asthana, for the appellants.

Messrs. S. N. Gupta and Bhagwati Shankar, for the respondents.

THOM, J.:—The question referred to this Bench for decision arose in the consideration of a second appeal in a suit in which the plaintiff sought for an order from

\*Appeal No. 83 of 1934, under section 10 of the Letters Patent.

the court directing the defendants to open certain drains and for an injunction against the defendants restraining them from interfering with the plaintiffs' right to drain off the rain water and sewage from their house through these drains.

The court of first instance dismissed the suit. The order of the first court was modified by the lower appellate court. In second appeal an injunction was granted to the plaintiffs restraining the defendants from closing the drains so as to prevent the rain water flowing from the plaintiffs' house through the drains. So far as the latrine water is concerned, however, the plaintiffs' prayer was refused upon the ground that the right to drain sewage water was not a continuous easement within the meaning of sections 5 and 13 of the Easements Act. It was not disputed that the easement was apparent and necessary for the plaintiffs' enjoyment of their share of the property. It was denied however that the easement claimed by the plaintiffs was continuous within the meaning of the provisions of the Easements Act.

According to section 5 of the Act a discontinuous easement is one that needs an act of man for its enjoyment and the *ratio decidendi* of the Court's order in second appeal was that the flowing of latrine water through a drain necessitated the act of man.

The parties, it appears, were co-sharers in certain house properties which were partitioned in 1925, one portion being allotted to the plaintiffs and the other to the defendants. The drain, which is the subject of the dispute, had been in existence long before the partition and had carried off both the rain water and the latrine water from the property.

By section 13(f) if an easement is apparent and continuous and necessary for the enjoyment of the share allotted to one of the parties on partition as that share was enjoyed when partition took place, such party shall, unless a different intention is expressed or necessarily implied, be entitled to such easement. Illustration (h)

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appended to this section is as follows: "A, the owner of two adjoining houses, Y and Z, sells Y to B, and retains Z. B is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying Y as it was enjoyed when the sale took effect, and A is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying Z as it was enjoyed when the sale took effect."

In refusing the plaintiffs' prayer in relation to latrine water in second appeal the learned CHIEF JUSTICE followed the decision in the case of *Sajid-un-nisa Bibi v. Hidayat Husain* (1). This is a single Judge decision. The learned Judge who decided the case held that the right to drain latrine water was an easement which was apparent but not continuous because the drainage of latrine water required an act of man. This decision appears to be the only authority in support of the proposition that the right to drain sewage from a latrine is not a continuous easement within the meaning of sections 5 and 13 of the Easements Act.

Learned counsel for the plaintiffs cited in support of the contention that the right to drain sewage from a latrine on to a servient tenement is a continuous easement within the meaning of the Easements Act, the following cases: *Bishambhar Nath v. Jagan Nath Prasad* (2), *Chintakindy Parvatamma v. Lanka Sanyasi* (3), *Morgan v. Kirby* (4), *Gangulu v. Jagannatham* (5) and *Kartic Manjhi v. Banamali Mukerji* (6).

In *Bishambhar Nath v. Jagan Nath Prasad* (2) it was held that by virtue of section 13, clause (d) of the Easements Act the plaintiff had a right to flow water from the kitchen of his house through the drain on to the defendant's property.

In *Chintakindy Parvatamma v. Lanka Sanyasi* (3) it was decided that a drain from one land to another is a

(1) (1924) 22 A.L.J., 425.

(3) (1910) I.L.R., 34 Mad., 487.

(5) A.I.R., 1924 Mad., 108.

(2) (1915) 29 Indian Cases, 695.

(4) (1878) I.L.R., 2 Mad., 46.

(6) A.I.R., 1930 Pat., 7.



continuous easement within the meaning of the Easements Act. In the course of his judgment in that case WALLIS, J., remarked: "It is well settled that a drain is a continuous easement; see among other cases *Pearson v. Spencer* (1) which expressly contrasts continuous easements such as drains with discontinuous easements such as rights of way; also *Pyer v. Carter* (2), which has never been questioned on this point." In the same case KRISHNASWAMY AYYAR, J., observed: "A continuous easement is defined in section 5 as 'one whose enjoyment is or may be continual without the act of man.' It was argued that drainage consequent on domestic use of water was a result of human activity and could not therefore be held to arise without the act of man. The argument if valid would apply to rain water dropping from the eaves of a building and even to artificial watercourses. It is pointed out in Gale on Easements, 7th edition, page 121, that the word 'continuous' may be understood to refer 'not to continuity of enjoyment but to permanence in the adoption of the tenement.' At page 123 he says: "Even in the case of drains the easement is not strictly 'continuous': the drain is not always flowing, but there is a necessary and permanent dependence of the house upon it for its enjoyment as a house, in the state in which it is at the time of the conveyance."

In *Morgan v. Kirby* (3) it was held that the right to flow water through an artificial channel was an apparent and continuous easement.

In *Gangulu v. Jagannatham* (4) it was held that where the plaintiffs' plots were all along watered through openings or vents, the existence of these vents was sufficient evidence of an apparent, continuous and necessary easement. "The vents might be closed for the sake of convenience after irrigating the plaintiffs' fields as a temporary measure just as a drain may be closed for

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(1) (1861) 1 B and S., 571.

(2) (1857) 1 H and N., 916.

(3) (1878) I.L.R., 2 Mad., 46.

(4) A.I.R., 1924 Mad., 108.



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clearing silt or for repairs, but this act being done for the proper enjoyment of the easement or in the course of the enjoyment of an easement which is continuous would not make the easement a non-continuous one."

In *Kartic Manjhi v. Banamali Mukerji* (1) it was decided that artificial watercourses or openings for taking water from a tank or *bandh* are apparent and continuous easements.

The authorities above referred to clearly support the view that the right to drain water from a latrine through a drain and on to a servient tenement is a continuous easement within the meaning of the Easements Act.

Apart from the authority of the decisions above referred to, however, it appears to me clear from the terms of the Act itself that the right to drain sewage water is a continuous easement. The words of illustration (h) to section 13 quoted above are sufficiently wide and leave no doubt on the matter. According to that illustration *all* gutters and drains common to two houses are continuous easements.

Further, I am unable to agree with the view that within the meaning of sections 5 and 13 of the Easements Act the utilization and enjoyment of a drain constructed for the purpose of leading of sewage from a latrine necessitates the act of man. Once the drain is constructed the sewage introduced into it will without the act of man, but by the mere force of gravity, flow on to the servient tenement if there is no obstruction. The essential element in the enjoyment of the drain is the free flow of the water from the dominant tenement to the servient tenement and once the drain has been properly constructed this free flow will be effected without the intervention of an act of man.

A discontinuous easement is defined by section 5 as one that needs the act of man for its enjoyment; but if sewage water once introduced into the drain flows freely

(1) A.I.R., 1930 Pat., 7.

through it to the servient tenement then the act of man is not needed for the enjoyment of the easement.

For the reasons given above, in my judgment the question referred to this Bench for decision, viz., whether the right to drain latrine sewage on to a servient tenement is a continuous easement, should be answered in the affirmative.

NIAMAT-ULLAH, J.:—The question of law, which the order of reference appears to contemplate, is whether the right annexed to one house of leading rain and sullage water through a drain passing across another house is a continuous easement within the meaning of section 5 of the Indian Easements Act.

The parties to this litigation were joint owners of a certain house property which was subsequently partitioned, one portion being allotted to the plaintiffs and the other to the defendants. It has been found that there was a drain in the defendants' portion through which the rain and sullage water used to flow from the plaintiffs' portion on to a municipal drain. After partition the defendants objected to the plaintiffs using the drain in the defendants' house for the passage of water from the plaintiffs' house. The plaintiffs complained of obstruction to the flow of water, and prayed for the relief of injunction restraining the defendants from closing the drain and preventing the passage of water from the plaintiffs' portion of the house through the drain.

The plaintiffs claimed relief on two grounds. First, they claimed an easement of necessity, and secondly an easement of the nature described in section 13(f) of the Indian Easements Act. It has been found that the plaintiffs have failed to establish their claim to an easement of necessity, and we are not concerned with this aspect of the case. Their right to relief on the second ground depends on the answer to the question which is the subject-matter of this reference.

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It will be seen that section 13 deals with rights arising (1) on transfer or bequest, and (2) on partition. Clauses (a) and (b) of section 13 provide in favour of a transferee what clauses (e) and (f) of the same section provide in favour of a co-sharer after partition. The principle underlying the two sets of clauses is identical. Clauses (a) and (e) deal with easements of necessity. Clauses (b) and (f) deal with apparent and continuous easements. That part of section 13 which deals with easements arising on partition is as follows:

“Where a partition is made of the joint property of several persons,—

(e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement; or

(f) if such an easement is apparent and continuous, and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.”

The difference between the two kinds of easements dealt with in the provision quoted above is that, in case of easement of necessity, the claimant must establish that he cannot enjoy his share at all without an easement being conceded to him; whereas the second kind of easement is available to him if he cannot enjoy the share allotted to him *in the manner in which it was enjoyed before the partition*, provided he can establish the further condition, namely that the easement is “apparent and continuous”. These two words are used in the section in a technical sense and are defined in section 5, in which a continuous easement is said to be “one whose enjoyment is, or may be, continual without the act of man”, and “an apparent easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him.” Conversely, “a discontinuous easement is one that needs the act of man for its enjoyment”, and “a

non-apparent easement is one that has no such sign" as is referred to above. In the present case, there can be no doubt that the easement claimed by the plaintiff is "apparent". The drain passing through the defendant's house is clearly shown by a permanent sign. There is no controversy between the parties on this point. The important question is whether it is also "continuous" in the above sense. It is argued on one side that, so far as water used in the plaintiffs' house for domestic purposes is concerned, it depends upon "the act of man" without whose agency there can be no occasion for the flow of such water. This view has found favour with the learned CHIEF JUSTICE who heard the appeal in the first instance and from whose decision a Letters Patent appeal was preferred. The reference has been made by the Bench hearing the Letters Patent appeal. The learned CHIEF JUSTICE granted the relief of injunction so far as the plaintiffs' right to lead rain water is concerned, on the ground that no act of man was necessary for the flow of such water. As regards the flow of water used for domestic purposes he held that it required the act of man and therefore an easement with respect to such water was discontinuous.

The view taken by the learned CHIEF JUSTICE follows the decision of MUKERJI, J., in *Sajid-un-nissa Bibi v. Hidayat Husain* (1). When the case was argued before the Bench hearing the Letters Patent appeal a reference was made to *Chintakindy Parvatamma v. Lanka Sanyasi* (2) and to some English cases in which a contrary view has been taken and which do not appear to have been quoted either before MUKERJI, J., or the learned CHIEF JUSTICE. In those cases a distinction, which seems to be one of nicety, was drawn between the act of man being necessary for the flow of water used for domestic purposes on the land belonging to the dominant tenement and on the land belonging to the servient owner in the course of its passage from one to the other.

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(1) (1924) 22 A.L.J., 425.

(2) (1910) I.L.R., 34 Mad., 487.

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The distinction is one which is apt to be lost sight of, unless it is specifically made a point of. It is difficult to say what view MUKERJI, J., or the learned CHIEF JUSTICE would have taken if this distinction had been founded on in the contention put forward on behalf of the claimant.

*Niamat-  
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We are to consider, in the first instance, the provisions of the Indian Easements Act; and, unless the view taken in the English cases can be supported on the language of that Act, we are not free to accept it, even though it may be such as to tend to general convenience. It may be conceded at once that to allow a plaintiff the right to use the defendant's drain for the purpose of leading one kind of water and not another is likely to give rise to friction. It seems to me that, apart from positive nuisance, it is more desirable that the law should allow an easement with regard to both kinds of water or not at all. Having given a careful consideration to all the relevant sections of the Indian Easements Act, I am of opinion that its provisions are identical with the rule laid down in the English cases. To my mind, the key to the entire problem is furnished by the definition of "easement" given in section 4 of the Act; and as the word "easement" occurs in the definition of "continuous easement", which expression is an integral part of section 13(f) with which we are immediately concerned, we should read the definition of "easement" into clause (f). Now, easement is defined as "A right . . . to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land" not belonging to the dominant owner. If we import this definition of the word "easement" into the definition of "continuous easement", the definition of the latter will be amplified thus: "A continuous easement is a right to do and continue to do something, or prevent and continue to prevent something being done, without the act of man, in or upon, or in respect of, certain other land not

belonging to the dominant owner." It will be seen at a glance that the act of man, so far as it affects the easement being continuous or discontinuous, is something done upon the land belonging to the servient owner. So long as domestic water remains on the land belonging to the dominant owner—and it is there that the act of man comes in—the exercise of easement does not begin. It begins when it leaves the land belonging to the dominant owner and begins to flow on the servient tenement. So far as its flow on the latter is concerned, no act of man intervenes, unless it is a case in which the flow of any water is not possible without the dominant owner doing something on the land of the servient owner, for instance, opening a passage which is closed except when he desires to lead the water. It is clear to me that during the passage of water on the servient tenement, which alone amounts to the exercise of easement, no act of man is necessary. For these reasons, I am of opinion that no distinction can be made between water used for domestic purposes and rain water and that the plaintiffs have as much right to use the defendants' drain for the former as for the latter. I answer the question referred to us accordingly.

BENNET, J.:—I agree with the judgments of my learned brothers.

BY THE COURT:—The question contemplated by the reference, namely whether the right to drain sewage on to a servient tenement is a continuous easement, is answered in the affirmative.

### FULL BENCH

*Before Sir Shah Muhammad Sulaiman, Chief Justice,  
Mr. Justice Harries and Mr. Justice Bajpai*

EMPEROR v. ASGHAR AND OTHERS\*

*Criminal Procedure Code, sections 208, 347—Commitment by Magistrate without taking all the evidence for the prosecution—Procedure illegal—Quashing of commitment.*

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*Held*, that a Magistrate, who under chapter XVIII of the Criminal Procedure Code is inquiring into a case triable by the court of session or High Court, and to whom, before the prosecution evidence is closed, it appears that the case is one which ought to be tried by the court of session or High Court, is not empowered under section 347 of the Criminal Procedure Code (subject to the production of defence witnesses under section 212) to commit the accused for such trial without completing the rest of the prosecution evidence, and that he is bound to record the rest of the evidence for the prosecution under section 208 of the Criminal Procedure Code and then commit.

Section 347 of the Criminal Procedure Code is controlled by the provisions contained in chapter XVIII of the Code. The section says that the Magistrate shall commit the accused "under the provisions hereinbefore contained" and the reference is to the provisions contained in chapter XVIII.

It is only fair to the accused that the whole of the prosecution evidence should be led in the Magistrate's court as directed by section 208, and unless that is done the accused will hardly be in a position to give a complete list of his witnesses, which he is required to do by section 211 of the Code. It could not have been the intention of the legislature in enacting section 347 to give power to the Magistrate to override this provision for procedure, obviously intended for the benefit of the accused, contained in chapter XVIII.

The Assistant Government Advocate (Dr. M. Wali-ullah), for the Crown.

The opposite parties were not represented.

BAJPAI, J.:—This is a reference by the learned Sessions Judge of Allahabad recommending that a certain commitment made by a Magistrate of the first class under section 302 of the Indian Penal Code may be quashed on the ground that it is bad in law. On account of the importance of the question of law involved in the case the matter has been referred to a Full Bench. The facts may be briefly stated. It appears that one Bhima met with his death on the 19th of December, 1934, and a first information report was lodged at police station Allahabad at 7.45 p.m. by Kallu, the brother of the deceased. He named three persons, Asghar, Nazir and Ghani, as the assailants of his brother. In the first

information report itself two persons Poni and Mahadeo were mentioned as eye-witnesses. The police investigated the case and named seventeen witnesses in the charge-sheet submitted to the Magistrate. The committing Magistrate recorded the evidence of only four out of these seventeen witnesses, two of them being more or less formal, namely, the Civil Surgeon who made the post-mortem examination and the sub-inspector who investigated the case. He also examined Kallu, the brother of the deceased, who made the first information report and Mahadeo Pasi who professed to be an eye-witness. Poni and several other prosecution witnesses who were named in the charge sheet were not examined. The learned Magistrate, after examining the accused under section 342 of the Criminal Procedure Code and framing the charge, committed the accused to the court of session, contenting himself with a note in the calendar of witnesses submitted by him that the remaining thirteen witnesses would be produced in the court of session. Presumably, the committing Magistrate in adopting this procedure relied upon certain observations made by this Court in the case of *Emperor v. Jhabwala* (1). The learned Sessions Judge was of the opinion that the procedure was illegal and that the commitment ought to be quashed.

I have got to consider whether the committing Magistrate was justified under the law in adopting the procedure which he did. There can be no doubt that the Magistrate was holding an inquiry under chapter XVIII of the Code of Criminal Procedure into a case triable by the court of session. Section 207 of the Code says: "The following procedure shall be adopted in inquiries before Magistrates where the case is triable exclusively by a court of session or High Court, or, in the opinion of the Magistrate, ought to be tried by such court." It is clear that this section deals with two sorts of cases, (1) those triable exclusively by a court of session

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(1) (1933) I.L.R., 55 All. 1040.



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or High Court and (2) those which in the opinion of the Magistrate ought to be so tried. The present case was a case which was triable exclusively by a court of session and therefore, in accordance with the provisions of section 207, it was obligatory on the Magistrate to follow the provisions of chapter XVIII; but it is obvious that he has construed the provisions of section 347 of the Criminal Procedure Code as empowering him not to follow the imperative provisions contained in sections 208 to 220. I shall consider the scope of section 347 at a later stage, but in the beginning I propose to consider in some detail the provisions of chapter XVIII. Section 208 says that "The Magistrate shall, when the accused appears or is brought before him, proceed to hear the complainant, and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or in behalf of the accused, or as may be called for by the Magistrate; and the accused shall be at liberty to cross-examine the witnesses for the prosecution, and in such case the prosecutor may re-examine them." It is clear that the taking of all this evidence is obligatory before a committal order can be properly made. In the present case the prosecution definitely wanted the production of seventeen witnesses, and if section 208 alone were looked at, it is apparent that the Magistrate has failed to comply with the imperative rule laid down in that section.

The question, however, arises as to whether by reason of section 347 of the Code the Magistrate was not entitled to commit the accused for trial to the court of session at an earlier stage of the proceedings. Section 347 of the Code is: "If in any inquiry before a Magistrate, or in any trial before a Magistrate before signing judgment, it appears to him *at any stage of the proceedings* that the case is one which ought to be tried by the court of session or High Court, and if he is empowered to commit for trial, he shall commit the accused under the provisions hereinbefore contained."

The words "stop further proceedings and" have been omitted between "shall" and "commit" by section 91 of the Criminal Procedure Code (Amendment) Act XVIII of 1923. Under the old law there was a conflict of opinion as to the meaning of the words "stop further proceedings". In *Phanindra Nath Mitra v. Emperor* (1) a very restricted meaning was assigned to these words, and it was held that when a Magistrate considers that the case is one which ought to be tried by the court of session he should at once stop all proceedings and *then and there* pass an order of commitment to the sessions even though neither the witnesses for the prosecution had been cross-examined nor the defence witnesses examined. The learned Judges were of the opinion that the power of a Magistrate to make commitment under this section *was not subject* to the provisions of chapter XVIII. The Madras High Court and the Allahabad High Court even under the old law were of the opinion that the words "stop further proceedings" simply meant that the Magistrate should stop proceeding with the case *as a trial* and should commit the case to the sessions and in thus committing he should adopt the procedure laid down in chapter XVIII. It was said that these words did not enable the Magistrate to shorten the proceedings and then and there pass an order of commitment, which, without taking all such evidence as the accused was prepared to produce before the Magistrate, was held to be invalid; see the case of *Sessions Judge of Coimbatore v. Kangaya Mantradiyar* (2) and the case of *Emperor v. Muhammad Hadi* (3). I am of the opinion that in view of the present amendment which has deleted the ambiguous words "stop further proceedings" the legislature intended to bring section 347 into line with section 208, and a Magistrate is not empowered to pass an order of commitment without following the provisions contained in chapter

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(1) (1908) I.L.R., 36 Cal., 48. (2) (1912) I.L.R., 36 Mad., 321.

(3) (1903) I.L.R., 26 All., 177.

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XVIII. In order to justify the action of the Magistrate in the present case the word "commit" in section 347 should be confined to the mere writing and signing of a commitment order, ignoring completely the fact that the committal is to be made "under the provisions" (the word is in the plural) "hereinbefore contained." The committing order can be made only under section 213 of the Code, a section which occurs in chapter XVIII, and it is therefore clear that when acting under section 347 the Magistrate has to do something referable to chapter XVIII, and when the legislature speaks of "provisions" it is obvious to my mind that the entire procedure laid down in chapter XVIII has got to be followed.

It may perhaps be useful if at this stage I trace the history of section 347, and I cannot do better than quote at length from the judgment of Fox, C.J., in the case of *Emperor v. Channing Arnold* (1):

"Section 347 is the successor to section 221 of the Criminal Procedure Code of 1872. That section was in chapter XVII which contained the provisions regarding the trial of warrant cases by Magistrates. It ran as follows: 'In any trial before a Magistrate, in which it may appear at any stage of the proceedings that from any cause the case is one which the Magistrate is not competent to try, or one which, in the opinion of such Magistrate, ought to be tried by the court of session or High Court, the Magistrate shall stop further proceedings under this chapter and shall, when he cannot or ought not to make the accused person over to an officer empowered under section 36 (i.e., a Magistrate empowered to award sentences up to seven years' imprisonment), commit the prisoner under the provisions hereinbefore contained. If such Magistrate is not empowered to commit, he shall proceed under section 45.' This last mentioned section is similar to

(1) (1912) 17 Indian Cases, 813.

section 346 of the present Code. In the general revision and re-arrangement of the Code, there was, no doubt, good reason for removing this provision from the chapter dealing with warrant cases to the chapter dealing with provisions applicable generally to all inquiries and trials before Magistrates. Possibly one reason may have been that according to some decisions in High Courts, a trial of a warrant case before a Magistrate did not begin until accused had been charged and his plea to the charge had been taken, and in order to avoid all possible question as to the applicability of provisions similar to those of section 221 of the Code of 1872 to any stage of a proceeding before a Magistrate, the legislature inserted the words 'in any inquiry' in section 347 of the Code of 1882 which is enacted in the Code of 1898."

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It might be argued that section 347 was enacted with a view to shortening the proceedings before commitment, but the entire scheme of the Code seems to be against this view. I have already referred to sections 207 and 208. Section 209, clause (2) lays down that a Magistrate may discharge the accused at any stage, but under section 210 he can frame a charge only when all the evidence under section 208 has been taken and the accused has been examined. Section 210 may be compared with section 254 which says that a Magistrate can frame in writing a charge against the accused when evidence under section 252 has been taken and when examination of the accused has been made *or at any previous stage of the case*. It must, therefore, be conceded that a Magistrate inquiring into a case triable by the court of session is bound to take all the evidence that the prosecution may desire to produce, even if he was satisfied at an earlier stage that a *prima facie* case had been made out against the accused, and in refusing the witnesses that the prosecution wanted to produce in the present case the Magistrate has undoubtedly erred.



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I should not be deemed to hold that when a Magistrate proceeds to commit a case under section 347 to the court of session while conducting a trial -or holding any inquiry other than one under chapter XVIII, proceedings under chapter XVIII are to be commenced *de novo*. If the Magistrate has already completed the evidence of the complainant and his witnesses, it is not necessary for him to take that evidence afresh; all that is necessary is that in respect of the remaining proceedings the provisions of chapter XVIII should be followed and he should not deprive the accused of any right which he might have exercised under chapter XVIII if the case had been treated as an inquiry under that chapter from the outset. I am in complete agreement on this point with the view expressed in the case of *Empress of India v. Ilahi Bakhsh* (1) and the case of *Emperor v. Ram Ghulam* (2).

Coming once more back to section 347 it is clear that it refers both to an inquiry before a Magistrate and to a trial before a Magistrate, and in either case I am of the opinion that the provisions of chapter XVIII have got to be complied with and it is not open to a Magistrate to commit the accused for trial the moment it appears to him that the case is one which ought to be tried by the court of session. Over and above the reasons given by Fox, C.J., for removing section 347 from chapter XVII to chapter XXIV it might be mentioned that the word "inquiry" is a very comprehensive term, including, as it does, every inquiry other than a trial conducted under the Code of Criminal Procedure by a Magistrate or court. A proceeding under chapter XII is an inquiry; a proceeding under section 176 is an inquiry; and it might have been the intention of the legislature to authorize a Magistrate (otherwise empowered to commit for trial) holding any kind of inquiry to commit an accused to the court of

(1) (1880) I.L.R., 2 All., 910.

(2) (1931) I.L.R., 53 All., 692.

session and therefore section 347 finds a place in "General provisions as to inquiries and trials".

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There is yet another matter which requires consideration. It is said that although by reason of section 208 a committing Magistrate may not be authorized to commit an accused to the court of session without taking the entire evidence which the prosecution and the defence might want to produce, it is not necessary that the prosecution should produce before the Magistrate all the evidence which it intends to produce before the court of session when it is well known that the Magistrate is inquiring into a case triable exclusively by the court of session. Although perhaps it might be true, as was observed by PLOWDEN, J., in *Khan Muhammad v. Empress* (1) that "there was no provision either in the Evidence Act or in the Criminal Procedure Code which empowered, much less required, a Sessions Judge to refuse to take the evidence of a relevant witness tendered for the prosecution, merely because he had not been examined before the committing Magistrate", the intention of the legislature is clear that the accused should know the evidence on which the prosecution proposes to rely and that such evidence should be in the presence of the accused before the Magistrate inquiring into the case. Section 211 requires the accused to give a list of witnesses he wishes to be summoned to give evidence on his trial, as soon as the charge is framed against him under section 210, and there is no provision in the Code enabling the accused as a matter of right to give a further list of witnesses before the court of session, and it is difficult to see how the accused can give a complete list of his witnesses unless he has heard all the evidence against him. Section 219 provides that the Magistrate may, if he thinks fit, summon and examine supplementary witnesses even after the commitment and before the commencement of the trial, and such examination shall, if possible, be

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(1) Punj. Rec. 1889 (Cr. J.) p. 1.



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taken in the presence of the accused. The attendance of the complainant and the prosecution witnesses before the court of session is secured by the committing Magistrate getting them to execute bonds binding them to be in attendance when called upon at the court of session under section 217 and the Magistrate summons under section 216 the witnesses included in the list given by the accused under section 211, and it therefore appears that the summoning of witnesses both for the Crown and for the defence is done in the court of the committing Magistrate, and although there may be no clear provision requiring a Sessions Judge to refuse to take the evidence of a relevant witness tendered for the prosecution the policy seems to be that these preliminaries should be settled in the court of the committing Magistrate. If the intention of the legislature had been to allow any witness produced by the prosecution for the first time before the court of session, there was no necessity for enacting section 219 and that is perhaps the strongest argument against the view that it is open to the prosecutor to withhold some witnesses from the court of the committing Magistrate.

In fairness to the accused, in fairness to the prosecution, and in fairness to the Magistrate the prosecutor should not be in a position to decide as to the sufficiency or otherwise of the evidence which should be placed before a Magistrate, for it may well be that if all the witnesses had been examined the case against the accused might break down completely and it may also be that in the absence of the evidence which the prosecution could produce but which has not been produced, the Magistrate may discharge the accused (who otherwise ought to have been committed) because he is not satisfied with the evidence produced before him. In spite of all these precautions a case may yet arise where it might be essential for the just decision of a case that a court may have the power to summon any person as a witness or examine any person in

attendance though not summoned as a witness, and it is for this reason that section 540 was enacted. I do not wish to suggest for a moment that a witness who has not been examined by the committing Magistrate can in no case be examined before the sessions court, but section 540 seems to be the only provision under which a new witness can be examined before the court of session.

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I am, therefore, of the opinion that section 347 is controlled by the provisions contained in chapter XVIII. As was pointed out by Fox, C.J., at page 818 in the case of *Emperor v. Channing Arnold* (1) referred to above, "Perhaps the strongest reason for holding that section 347 in no way overrides and in no way dispenses with the obligation of following chapter XVIII is that in that chapter the legislature has laid down provisions for procedure before commitment some of which were obviously intended and rightly intended for the benefit of accused persons", and it could not have been the intention of the legislature after having first enacted certain special provisions of procedure prior to a committing order for the benefit of the accused persons to say later on in the same Act in a general provision that the previous procedure need not be followed.

I, therefore, agree with the learned Sessions Judge that the committing order in the present case should be quashed and the Magistrate be directed to hold a complete inquiry in accordance with the procedure laid down by law.

My answer to the point referred to the Full Bench for determination is that a Magistrate, who under chapter XVIII of the Criminal Procedure Code is inquiring into a case triable by the court of session or High Court, and to whom, before the prosecution evidence is closed, it appears that the case is one which ought to be tried by the court of session or High Court,

(1) (1912) 17 Indian Cases, 813.

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is not empowered under section 347 of the Criminal Procedure Code (subject to the production of defence witnesses under section 212) to commit the accused for such trial without completing the rest of the prosecution evidence, and that he is bound to record the rest of the evidence for the prosecution under section 208 of the Criminal Procedure Code and then commit.

HARRIES, J.:—I entirely agree with the judgment delivered by BAJPAL, J., and have nothing to add. In my view the question referred to this Full Bench should be answered in the manner indicated by BAJPAL, J., in his judgment.

SULAIMAN, C.J.:—As I was a member of the Bench which decided *Jhabwala's* case (1), known as the Meerut conspiracy case, I should like to add a few words. In that case we were obsessed by the enormous delay of nearly  $4\frac{1}{2}$  years that had taken place. The question whether the entire evidence for the prosecution must be produced before the committing Magistrate did not arise for decision in that case, nor was the point argued before us at the Bar. Our observations were no doubt in the nature of *obiter dicta* and therefore not of any binding authority. We made it clear that if a Magistrate stopped proceedings and did not take all the evidence that the prosecution wished to produce, and discharged the accused, the order would be improper, and that similarly if he did not take all the evidence offered by the accused and nevertheless committed the accused to the court of session, the order would be illegal and bound to be set aside. We emphasised that the Code could not mean that even if the Magistrate after hearing part of the evidence for the accused is satisfied that there is no case for commitment at all he should nevertheless proceed to complete the recording of the entire defence evidence. But we also certainly expressed our own view that the entire evidence for the

(1) (1933) I.L.R., 55 All., 1040.

prosecution need not be produced before the Magistrate, provided notice of all the evidence to be produced in the sessions court is given to the accused before trial, so that he may not be prejudiced, and particularly so, if there is a mass of similar evidence tending to prove the same point.

This latter view was based on our interpretation of section 347 of the Criminal Procedure Code. We were aware that by an amendment (1923) the words "stop further proceedings" had been deleted; but we noted that the words "at any stage of the proceedings" were still retained. We felt that the last words "shall commit the accused under the provisions hereinbefore contained" could not mean that there should be an inquiry *de novo* under chapter XVIII and the entire evidence taken down afresh, but that the Magistrate should proceed from the stage which is appropriate. The word "inquiry" in section 347 is certainly wide enough to include an inquiry under chapter XVIII and therefore section 347 would *prima facie* be applicable. We felt that if the section be applicable, its provisions could not be altogether redundant and superfluous.

It must, however, be conceded that there is plenty of authority for the other interpretation that in spite of section 347 the Magistrate must proceed under the provisions of chapter XVIII to complete the entire evidence for the prosecution. In addition to the cases of this Court distinguished in *Jhabwala's* case (1), there are cases of other High Courts as well. Although on the one hand the duplication of the evidence and the double hearing in two courts may be harassing to the accused, on the other hand the rule that the entire evidence should be produced before the Magistrate is only fair to the accused. After all, if there is need to provide against an unnecessary waste of time the legislature can intervene and amend the Act. In view

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of the opinions expressed previously, I now think that it would be safer to adhere to that view on the principle of *stare decisis* and not make any departure. On reconsideration, therefore, I agree that the opinion that the entire evidence for the prosecution need not be produced before the committing Magistrate should be taken as an *obiter dictum* and not followed in practice. In this case seventeen witnesses had been named in the charge-sheet, out of whom the Magistrate examined only four, two out of these four being of a formal character. Commitment on such incomplete evidence was certainly not contemplated by us.

By THE COURT:—The answer to the question referred to us is that the Magistrate was bound to complete the rest of the prosecution evidence and allow the accused an opportunity to produce his evidence before committing him to the court of session.

### APPELLATE CRIMINAL

Before Mr. Justice Allsop and Mr. Justice Ganga Nath

1935  
 November, 19

EMPEROR v. NARAIN\*

*Cantonments Act (II of 1924), section 236(1)—Whether a pimp can be convicted under this section*

There is nothing in the wording of section 236(1) of the Cantonments Act which says that the person importuning must importune to the commission of sexual immorality with himself or herself. A pimp who importunes a person to the commission of sexual immorality with some other person is also liable to be convicted under this section.

The Government Advocate (Mr. Muhammad Ismail), for the Crown.

Mr. B. S. Darbari, for the respondent.

ALLSOP and GANGA NATH, JJ.:—The respondent Narain Kachi was sentenced by a Magistrate in Agra to rigorous imprisonment for a period of one month under

\*Criminal Appeal No. 617 of 1935, by the Local Government, from an order of Girish Prasad, Additional Sessions Judge of Agra, dated the 21st of May, 1935.

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the provisions of section 236(1) of the Cantonments Act for importuning certain British soldiers to the commission of sexual immorality. He appealed to the Sessions Judge who acquitted him upon a point of law. The section under which the respondent was convicted is in the following terms:—"Whoever in a cantonment loiters for the purpose of prostitution or importunes any person to the commission of sexual immorality shall be punishable with imprisonment which may extend to one month or with fine which may extend to Rs.200."

The charge against the respondent was that he had approached certain soldiers and had offered to supply to them a girl for Rs.2 or a boy for Re.1. The Sessions Judge held that nobody could be convicted under the section unless he was loitering for the purpose of prostituting himself or importuned any person to the commission of sexual immorality with himself. The learned Judge said: "It appears from the scheme of the section that the person importuning any person to the commission of sexual immorality must be the boy or the girl who offers himself or herself for sexual immorality and not a third person who only acts as a go-between." In his opinion the combination of loitering with importuning clearly showed that the person punishable must be the object of the sexual immorality. A Bench of the Bombay High Court in the case of *Emperor v. Maridas Lazar* (1), said that it would seem to be desirable that a pimp should be liable to be prosecuted just as well as the woman who was to be the subject of prostitution. We are in agreement with this view and we do not think that there is anything in the wording of the section which justifies the conclusion to which the learned Sessions Judge came. The section does not say that the person must loiter for the purpose of his or her own prostitution or must importune another to the commission of sexual immorality

(1) A.I.R., 1926 Bom., 227.



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with the person so importuning. . Even if the charge was one of loitering it does not seem to us that it would necessarily be true that nobody could be prosecuted unless he or she was loitering for the purpose of prostituting his or her own person. We can conceive of a case where a woman loiters as a decoy so that she may give the impression that she is loitering for the purpose of prostitution intending to take any man who accosts her to some house of ill fame where he may have intercourse with some other woman. We are not however in this case to consider whether a person who loiters for the purpose of the prostitution of others is liable to punishment. We are concerned with the second part of the section and it is perfectly clear that there is nothing in the wording which says that the person importuning must importune to the commission of sexual immorality with himself or herself. We cannot read into the section words which are not there.

We are satisfied therefore that the respondent was guilty of the offence with which he was charged if the facts were true.

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There remains the question of fact whether the respondent was guilty or not. This was a question which the learned Sessions Judge did not consider. We might send the case back to him in order that he might consider it, but as this is a very small matter and as the evidence is included only in the judgment of the learned Magistrate we think we can go into the question for ourselves.

We have given learned counsel for the respondent an opportunity to discuss the evidence and he has not said anything which would lead us to suppose that the evidence is not true . . . We believe that the respondent did importune the witnesses to the commission of sexual immorality and we are satisfied that he was guilty of the offence with which he was charged.

The Local Government have appealed against the acquittal. We allow the appeal and find the respondent guilty. He has been sentenced by the learned Magistrate to rigorous imprisonment for a period of one month, the maximum sentence which can be passed. It is urged before us that his was a first offence or at any rate this was a first conviction and that it would be preferable to substitute a sentence of fine for one of imprisonment. We are prepared to accede to this request made on behalf of the respondent. We therefore sentence him under section 236(1) of the Cantonments Act to a fine of Rs.50 and direct that he shall, if he does not pay the fine, suffer rigorous imprisonment for a period of one week.

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### APPELLATE CIVIL

*Before Mr. Justice Harries and Mr. Justice Rachhpal Singh*

HARISH CHANDRA (PLAINTIFF) v. HINDU DHARAM  
SEWAK MANDAL AND ANOTHER (DEFENDANTS)\*

1935  
November, 22

*Gift—Specific purpose—Subsequent impossibility of carrying out the purpose—Failure of gift—Conditional gift—General charitable intention absent.*

A gift was made of certain land to the Secretary of the Hindu Dharam Sewak Mandal for the express purpose of being used as the site of an *ashram* to be built for imparting training to young Hindu religious reformers; the circumstances did not disclose a general charitable intention. During several years the Mandal did nothing in the way of building the *ashram* and ultimately the Mandal ceased to exist, having been absorbed by the Hindu Maha Sabha. After the death of the donor his son sued to recover the land:

*Held*, that where a land is given for a specific purpose, and for a specific purpose only, then such gift becomes a nullity if the performance of that purpose is rendered impossible. Such a gift is a conditional one; if the performance of the condition becomes impossible, the gift never really takes effect. In the present case the land having been given not with a

\*Second Appeal No. 1014 of 1934, from a decree of I. B. Mundle, District Judge of Saharanpur, dated the 9th of March, 1934, reversing a decree of M. A. Ansari, Subordinate Judge of Dehra Dun, dated the 29th of November, 1930.



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general charitable intention but for a specific charitable purpose, namely the erection of an *ashram* by the Hindu Dharam Sewak Mandal, and that purpose having become impossible to carry out by reason of the said Mandal having ceased to exist, the gift failed and the land reverted to the donor or his heirs. It would not be a performance of the donor's expressed purpose if the Hindu Maha Sabha, in which the Mandal had become absorbed, were to build an *ashram* on the land.

Messrs. *P. L. Banerji* and *Govind Das*, for the appellant.

Mr. *P. N. Sapru*, for the respondents.

HARRIES and RACHHPAL SINGH, JJ.:—This is a plaintiff's second appeal against a decree of the lower appellate court dismissing his claim.

The plaintiff's claim was for possession of certain property together with mesne profits, and the court of first instance whilst refusing to give him any mesne profits decreed his claim for possession. On appeal, however, the learned District Judge of Saharanpur reversed the decision of the trial court and dismissed the plaintiff's claim; hence the present appeal.

The claim was for the possession of a piece of land which had been purchased in the following circumstances. The plaintiff's father, Rai Saheb Sheo Nath, was a social reformer and a man of a religious turn of mind. It appears that he and Pandit Deo Ratan Sharma had become very friendly and had discussed a project of erecting in Dehra Dun a home for the training of Hindu religious reformers. In order to make the building of this home possible the plaintiff's father agreed that he would purchase property upon which this home was to be built, and in due course he did purchase some land from the Bhagwan Das Bank and instructed the Bank to make out the transfer in the name of Pandit Deo Ratan Sharma in his capacity as a Secretary of the Hindu Dharam Sewak Mandal.

It is unnecessary to discuss at length the precise circumstances in which this transaction took place, and it is sufficient shortly to refer to the findings of the

lower appellate court. The lower appellate court held that this land was conveyed to Deo Ratan Sharma, as Secretary of the Hindu Dharam Sewak Mandal, in pursuance of the plaintiff's father's object of providing an *ashram* at Dehra Dun to be known as the Hindu Dharam Sadan. It was in evidence that the plaintiff's father had prepared a draft in consultation with Pandit Deo Ratan Sharma setting out the objects of this *ashram*, though the latter denied that he was consulted in the drafting of such document. However, upon the evidence the learned District Judge did find that the land was conveyed to Pandit Deo Ratan Sharma, as Secretary of the Hindu Dharam Sewak Mandal, for the purpose of being used as the site of an *ashram* for the training of young Hindu religious reformers. It has been urged before us that there is no specific finding to that effect, but, in our view, upon a fair reading of the judgment it is clear that the learned District Judge did so hold. He sets out the facts as found by him and later refers to the trust which was created by the transfer of the property in the manner indicated above. The whole judgment proceeds upon the basis that the land was purchased by the plaintiff's father and transferred to the Hindu Dharam Sewak Mandal for the express purpose of providing a site for the *ashram* the foundation of which had been discussed between the parties. The intention with which this gift was made is a question of fact which cannot be challenged in this Court.

A number of points have been taken before us by counsel for the appellant in this case, but it is only necessary shortly to refer to one of them, because in our judgment that contention is fatal to the case of the present respondents. It is contended by the appellant that this being a gift for a specific purpose and for a specific object, the gift has failed, because the performance of such a purpose or object has become impossible.

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It is an admitted fact that the Hindu Dharam Sewak Mandal did not erect an *ashram* upon this property and in fact did nothing with the land for a number of years. Further it is admitted in the written statement of the Hindu Dharam Sewak Mandal that that body has now ceased to exist, and that being so, it can never build an *ashram* upon this land. For these reasons it has been contended by the appellant that the purpose for which this land was conveyed to the Hindu Dharam Sewak Mandal can never be performed, and that being so, the land must revert to the donor or his successors in title.

The present respondents admit that whilst the Hindu Dharam Sewak Mandal was in existence nothing was done with regard to this land. In paragraph 6 of the written statement of Pandit Deo Ratan Sharma the admission is in this form: "The proposal regarding Hindu Dharam Sadan never took any shape."

However, it is contended that though the Hindu Dharam Sewak Mandal has ceased to exist, it has been absorbed by the All-India Hindu Sabha, now known as the Hindu Maha Sabha. It is pointed out that in the rules of the Hindu Dharam Sewak Mandal it is provided that in certain events if it ceases to exist, its property should vest in the All-India Hindu Sabha, and it is urged that in the events that have happened the All-India Hindu Sabha, now known as the Hindu Maha Sabha, is the owner of this property. That being so, it is contended by the respondents that they are in a position to erect an *ashram* upon this land and, therefore, that the trust can yet be performed.

It is to be observed, however, that the land was given not to the All-India Hindu Sabha but to the Hindu Dharam Sewak Mandal, and there is nothing to show that the plaintiff's father knew of these rules which provided that in certain circumstances the All-India Hindu Sabha would succeed to any property held

by the Hindu Dharam Sewak Mandal. Clearly the gift was to this latter body and that body has ceased to exist. It is true that an *ashram* might yet be built upon this property, but it will never be the *ashram* contemplated by the plaintiff's father. It is contended that we must assume that the plaintiff's father would, if alive, have been quite satisfied with an *ashram* built by the All-India Hindu Sabha, but we can make no such assumption. He selected the Hindu Dharam Sewak Mandal as the body to erect this *ashram* upon the land which he conveyed to them, and we cannot assume that he had any purpose other than that the Hindu Dharam Sewak Mandal should build and manage the *ashram* upon the site which he provided for them. Upon the findings of the lower appellate court it is clear that the land was given for a specific charitable purpose and we cannot infer from the circumstances anything more. It has been contended that the circumstances disclose a general charitable intention, but we cannot agree with such a contention.

Where a land is given to a charitable body for a specific purpose and for a specific purpose only, then such gift becomes a nullity if the performance of that purpose is rendered impossible. In short such a gift is a conditional one. It becomes a good charitable gift upon the condition being performed. If the performance of the condition is rendered impossible, the gift never really takes effect. That in our view is the effect of the English case of *In re University of London Medical Science Institute Fund; Fowler v. Attorney-General* (1). That case has been followed by the Oudh Chief Court in the case of *Audesh Singh v. Commissioner, Lucknow* (2). In this latter case it was specifically held that where a donor had given a subscription for a specific charitable purpose, the performance of which had become impossible, he was entitled to a refund of his money. In that case the performance

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(1) [1909] 2 Ch. 1.

(2) A.I.R., 1934 Oudh, 329.

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of the charitable purpose became impossible by reason of the passing of the University Act, and, as the court held there was only a specific charitable intent and no general charitable intention, the donor was entitled to a refund of his money when the specific purpose for which the money was given was rendered impossible.

In our judgment the English case cited above, followed and approved of in the Oudh case, correctly sets out the law applicable to this case and is binding upon us. In the present case this land was given not with a general charitable intention but for a specific charitable purpose, namely the erection of an *ashram* by the Hindu Dharam Sewak Mandal. That object and purpose can never be carried out or fulfilled, and that being so, the gift fails. The erection of this *ashram* by the Hindu Dharam Sewak Mandal was a condition upon which the validity of this gift depended. It was a condition precedent, and, as it can never be performed, the donees are not entitled to the property.

Mr. Sapru, who has dealt very fully with this case, has cited to us a number of English authorities, which he contended supported his view that this gift was not a gift for a specific purpose. It is to be observed that in the cases cited by him there had been an out and out gift to the charity concerned, without any conditions being imposed. Mr. Sapru placed great reliance upon the case of *In re Monk; Giffen v. Wedd* (1), but from a perusal of the facts in that case it is clear that the testator intended that the whole of the money bequeathed should be devoted to charitable purposes. It is true that he directed how the money should be spent, but it is clear that he had a general charitable intention. SARGANT, L.J., at page 210 observed: "For the purpose of deciding the questions raised on this appeal the first and crucial point to be determined is whether the language of the testator's will, in relation to the dispositions made of his residue

(1) [1927] 2 Ch. 197.

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after the death of his wife, indicates a general charitable intention, coupled with specific directions as to the mode of carrying out that intention, or merely indicates a specific and limited charitable intention, the partial failure of which involves a partial failure of the gift." In that particular case the three learned Lords Justices held that the words used in the will indicated a general charitable intention, but, if words or acts merely indicate a specific and limited charitable intention, the total failure of such intention must involve the total failure of the gift. In our view *In re Monk; Giffen v. Wedd* (1) is a very strong authority in favour of the appellant in this case, Mr. Sapru relied upon other English cases, namely *In re Faraker; Faraker v. Durell* (2), *In re Welsh Hospital Fund; Thomas v. Attorney-General* (3) and *Re Pritt; Morton v. National Church League* (4); but in all these cases it is clear from the words used that the donor or testator intended the money to go to charity absolutely, whilst in the case before us, upon the findings of fact, there was no such intention. The intention clearly was a limited charitable intention, that is, that the donees of the property should erect upon it an *ashram* for the education of religious reformers. The charitable intent was specific and strictly limited, and as the performance of the condition has been rendered impossible, the gift has failed. As the gift has failed the land reverted to the successor in title to the donor, namely his eldest son and he is entitled to possession of the same.

In our view this is not a case where mesne profits should be given and the appellant has very properly not asked us to make such an order.

In the result, therefore, this appeal is allowed with costs and the decree of the learned Munsif restored. The plaintiff must also have his costs in both the lower courts.

(1) [1927] 2 Ch., 197.

(3) [1921] 1 Ch. 655.

(2) [1912] 2 Ch., 488.

(4) (1915) 113 L.T., 136.



## REVISIONAL CRIMINAL

*Before Mr. Justice Niamat-ullah*

EMPEROR *v.* PURANMASHI\*

1935  
*November, 25*

*Indian Penal Code, sections 268, 290—Public nuisance—Platforms built on road in front of shops—Lessees of shops sitting on the platforms for selling goods—Whether guilty of the offence.*

The owners of the houses or shops abutting on a public road had built platforms in front of them, and the lessees of the shops used to sit on the platforms for selling their goods: *Held*, that if the platforms were encroachments on the public road the persons who had built them could be convicted of public nuisance under section 268 of the Indian Penal Code, but not the lessees who had merely rented the shops and sat on the platforms. If the existence of the platforms was a public nuisance, it would be so whether any one sat on them or not.

Section 290 of the Indian Penal Code had no application to the facts of the case.

Mr. Sri Narain Sahai, for the applicant.

The Assistant Government Advocate (Dr. M. Wali-ullah), for the Crown.

NIAMAT-ULLAH, J.:—These are three references made by the learned Sessions Judge, Azamgarh. The three applicants in revision are the lessees of certain houses or shops in Sardaha Bazar in the district of Azamgarh. The Bazar is on either side of the road. The owners of the houses or shops occupied by the applicants built certain platforms in front of them. It does not appear when these platforms were built for the first time. There can be no doubt that the object of these platforms was to enable the shopkeepers to sit on them for selling their goods. The platforms are alleged to be encroachments on the public road and therefore to amount to public nuisance within the meaning of section 268 of the Indian Penal Code. On the facts which do not appear to have been disputed section 290 has no application whatever. The act

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\*Criminal Reference No. 743 of 1935.

made penal by that section is a public nuisance not otherwise punishable by the Indian Penal Code. Section 268 defines public nuisance as an act or illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. Assuming that the platform caused any common injury, danger or annoyance to the public or to the people in general, the persons who built the platforms are guilty of the act which *ex hypothesi* amounts to a public nuisance. The applicants, who have merely rented the shops and sit on the platforms, cannot be considered to be doing any act amounting to a public nuisance. If the existence of the platforms is a public nuisance, it will be so, whether anyone sits on them or not. In my opinion, the applicants were not guilty of the offence with which they were charged. The applications are allowed. The conviction and the sentence of fine are set aside. The fines, if paid, shall be refunded.

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### APPELLATE CRIMINAL

Before Mr. Justice Harries and Mr. Justice Rachhpal Singh

EMPEROR v. MATHURI AND OTHERS\*

*Criminal Procedure Code, section 239(e)—Joinder of charges and of persons—Indian Penal Code, sections 457, 460—Whether they are offences "which include theft"—Joint trial of some persons for house-breaking by night with other persons for receiving property stolen thereby, is illegal—Criminal Procedure Code, section 537—Illegality curable if no failure of justice—Criminal Procedure Code, sections 235, 236, 237—Charge under one offence and conviction under another offence—Joinder of a separate charge against some of several persons who are jointly tried under a common charge.*

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November, 26

\*Criminal Appeal No. 266 of 1935, by the Local Government from an order of Ganga Prasad Varma, Sessions Judge of Farrukhabad, dated the 12th of January, 1935.



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A house was burgled by night, jewellery was stolen, and two inmates of the house were murdered. Arising out of this occurrence a trial was held at which seven persons were tried together; the first two were each charged with offences under sections 302 and 457 of the Indian Penal Code; the third was charged with an offence under section 460; and the other four were charged with an offence under section 411 as some of the stolen jewellery had been found in their possession. The first two were acquitted of the charge under section 302 and convicted under section 460 though they had not been charged under that section; the third accused was acquitted; and out of the remaining four, two were acquitted and two were convicted under section 411. No objections as to misjoinder had been raised at the trial, but were raised in appeal: *Held*—

From the terms of section 239(e) of the Criminal Procedure Code it is clear that an "offence which includes theft" must mean an offence of which theft is a necessary and essential ingredient. Although theft may frequently follow an offence under section 457, or one under section 460, of the Indian Penal Code, it can not be said that theft or an intention to commit theft is a necessary or essential ingredient of either of those offences. Therefore, persons charged under sections 457 and 460 of the Indian Penal Code are not persons charged with offences which include theft and consequently they can not, by virtue of section 239(e) of the Criminal Procedure Code, be tried with persons charged with receiving stolen property which was stolen in a theft which was committed as part of the transaction involving the said offences, and such joint trial is contrary to law.

But although such a misjoinder of persons at one trial amounts to an illegality and is not a mere irregularity, it is yet curable by section 537 of the Criminal Procedure Code if it has not in fact occasioned a failure of justice. In the present case no objection was raised at the trial, nor was there anything on the record to show that there was any failure of justice.

Although the first two accused were not specifically charged under section 460 of the Indian Penal Code but under section 457, they could properly be convicted under section 460, by virtue of sections 236 and 237 of the Criminal Procedure Code.

Where several persons can properly be charged and tried together under section 239 of the Criminal Procedure Code, e.g. thieves and receivers of the stolen property by virtue of clause (e) of that section, there is nothing to prevent other

charges being added against one or more of such persons if the addition of such charges against those persons is permissible by other provisions of the Code, e.g. section 234 or 235.

The Government Advocate (Mr. *Muhammad Ismail*), for the Crown.

Messrs. *K. O. Carleton*, *H. M. Roy*, *L. M. Roy* and *S. K. Ghosh*, for the respondents.

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HARRIES and RACHHPAL SINGH, JJ.:—The appellants Mathuri, Ram Bharose, Mst. Sunder and Bishnu were, together with Sri Kishen, Suraj Prasad and Pyare Lal, tried by the learned Sessions Judge of the Farrukhabad District upon a number of charges. Mathuri and Ram Bharose were each charged with offences under sections 302 and 457 of the Indian Penal Code, Sri Kishen was charged with an offence under section 460 of the Indian Penal Code, whilst Mst. Sunder, Bishnu, Suraj Prasad and Pyare Lal were each charged with an offence under section 411 of the Indian Penal Code. All the accused were tried together upon these charges and eventually Sri Kishen, Suraj Prasad and Pyare Lal were found not guilty of the respective charges brought against them, and acquitted. Mathuri and Ram Bharose were found not guilty of murder under section 302 and were acquitted upon that charge, but they were convicted under section 460 though they were not specifically charged with an offence under that section, the charges against them being under sections 302 and 457 only. Mst. Sunder and Bishnu were each convicted under section 411. Mathuri and Ram Bharose were each sentenced to transportation for life under section 460, whereas Mst. Sunder and Bishnu were each sentenced to a term of two years' rigorous imprisonment under section 411.

Against their respective convictions each appellant has preferred an appeal to this Court and such is the subject-matter of Criminal Appeal No. 72 of 1935. On the other hand the Local Government, being dissatisfied with the acquittal of Mathuri and Ram

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Bharose upon the charges under section 302 and with the acquittal of Sri Kishen upon the charge under section 460, have preferred an appeal to this Court alleging that these acquittals are against the weight of evidence and therefore illegal. Such is the subject-matter of Criminal Appeal No. 266 of 1935. Sri Kishen is not before the Court and is said to be absconding and consequently we are not concerned with his case in this judgment. However, it is convenient to dispose of the appeals of Mathuri, Ram Bharose, Mst. Sunder and Bishnu and of the Government appeal against the acquittal of Mathuri and Ram Bharose in one judgment and that is the course we propose to follow.

The charges against the appellants arose out of an occurrence which undoubtedly took place upon the night of the 17th/18th of May, 1934, at the house of one Mst. Ram Devi in mohalla Lohai in the city of Farrukhabad. On that night a burglary was committed at this house during which ornaments and jewellery to the value of about Rs.35,000 were stolen and the occupants of the house, namely Mst. Ram Devi and a young boy Bhagwati Prasad, were foully done to death. It is the case for the prosecution that Mathuri, Ram Bharose and Sri Kishen were concerned in this burglary and that eventually part of the stolen property was received by the appellants Mst. Sunder and Bishnu and others, hence the charge under section 411 against them.

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It is the case for the prosecution that Mathuri, Ram Bharose, Sri Kishen, Birja (who is said to be absconding) and Puttu Singh, who became an approver, were the persons concerned in this burglary and the murders which undoubtedly took place during the course of this occurrence. It is said that some weeks earlier Mathuri, Sri Kishen, Birja and Puttu Singh had contemplated breaking into this house but that the attempt

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miscarried. However, on the 17th of May, 1934, it is alleged that the miscreants met together and determined that that night was a favourable opportunity to ransack this house and deprive Mst. Ram Devi of her jewellery. It is said that arrangements were made by Birja, who was temporarily acting as Mst. Ram Devi's servant, to leave the house open so that the burglars could get in without making any noise. It is the case for the prosecution that that night Mathuri, Ram Bharose, Sri Kishen, Birja and Puttu Singh got into this house, remained there until the occupants were asleep and then began to break open the almirahs and boxes in which the ornaments and jewellery were stored. The noise, it is said, awoke Mst. Ram Devi and the little boy Bhagwati Prasad and the former recognized Mathuri and Birja who were well known to her. It is then said that the five men, fearing that they would be exposed, decided to kill both the widow and the little boy and this they did by strangling both of them with a rope. After the occupants of the house had been disposed of in this manner the burglars completed the work of ransacking the house and then made good their escape.

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It has been strenuously contended by counsel for the appellants that the joint trial of these accused was contrary to law and that the whole trial is in consequence a nullity. It is said that there has been a misjoinder of persons and that such misjoinder is an illegality which vitiates the whole proceedings. Consequently it was urged upon us that we should, upon this ground, allow the appeal and quash the convictions and order a re-trial. The point taken as to misjoinder of persons is a point of considerable importance and we must deal with it in some detail.

Section 233 of the Criminal Procedure Code provides that for every distinct offence of which any person is accused there shall be a separate charge, and every such

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charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239. It is clear from this section that the general rule is that an accused person is entitled to be tried separately in respect of each charge. Exceptions are made, however, in certain cases which are dealt with in the sections referred to in section 233. Sections 234, 235 and 236 deal with cases of joinder of charges against an accused person, whereas section 239 deals with cases where persons can be jointly charged and tried together. What is urged in this case is that there has been a misjoinder of persons and that section 239 of the Criminal Procedure Code does not permit persons charged with offences under sections 302, 457 and 460 of the Indian Penal Code to be tried with persons charged with offences under section 411 of the Indian Penal Code.

The joinder of all these persons in one trial is only possible if the case comes within sub-section (e) of section 239 of the Criminal Procedure Code and it is the contention of the prosecution that the sub-section precisely covers this case. Sub-section (e) of section 239 provides that persons accused of an offence which includes theft, extortion, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first-named persons, or of abetment of or attempting to commit any such last-named offence can be charged and tried together.

It is conceded by counsel for the Crown that it cannot be said that an offence under section 302 is an offence which includes theft, extortion or criminal misappropriation, but it is urged that offences under sections 457 and 460 are clearly offences which do include theft. On the other hand it is contended by counsel for the appellants that as an offence under section 302 of the Indian Penal Code does not include theft it is

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immaterial whether offences under sections 457 and 460 do or do not include theft. It is urged that as persons charged with receiving stolen property were charged jointly and tried together with persons accused of murder the case is clearly outside the purview of sub-section (e) of section 239 of the Criminal Procedure Code. Counsel for the Crown, however, contended that if offences under section 457 and section 460 of the Indian Penal Code were offences which included theft, then the receivers of the stolen property could properly be joined with the persons charged under these sections. That being so, it was contended that there was nothing to prevent the prosecution charging one or more of the persons who were being tried together with other offences, provided that such a joinder of offences was permissible by other sections of the Code. Shortly put, the case for the Crown was that Mathuri, Ram Bharose and Sri Kishen could properly be jointly charged with the receivers of the stolen property because they were charged with offences under sections 457 and 460 of the Indian Penal Code which included theft. That being so, there was nothing to prevent a charge of murder being added against Mathuri and Ram Bharose because that offence formed part of the transaction which gave rise to the charges under sections 457 and 460 of the Indian Penal Code and such joinder of charges was clearly permissible under sections 235, 236 and 239(d) of the Criminal Procedure Code.

In the first place we have to consider whether or not offences under sections 457 and 460 of the Indian Penal Code are offences which include theft. In the case of *Sultan Ahmad v. Emperor* (1), it was assumed that an offence under section 457 of the Indian Penal Code was an offence which included theft. This is a single Judge case and is of course not binding upon us.

(1) A.I.R., 1929 Lah., 142.



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and it would appear from the judgment that no argument was addressed to the Court that an offence under section 457 did not include theft and that both parties proceeded upon the assumption that it did include theft. However, it has been strongly urged before us that an offence under section 457 of the Indian Penal Code is not an offence which includes theft and that neither does an offence under section 460 of the Indian Penal Code include theft.

The offence under section 457 of the Indian Penal Code is described as lurking house-trespass or house-breaking by night in order to commit an offence punishable with imprisonment. The section reads as follows: "Whoever commits lurking house-trespass by night, or house-breaking by night, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine; and, if the offence intended to be committed is theft, the term of the imprisonment may be extended to 14 years." Section 457 therefore contemplates two offences—one less serious than the other—the less serious being lurking house-trespass by night or house-breaking by night in order to commit an offence (other than theft) which is punishable with imprisonment, and the more serious being the committing of lurking house-trespass by night or house-breaking by night in order to commit theft. It is urged that the more serious offence contemplated in this section is an offence which includes theft and such was the offence with which Mathuri and Ram Bharose were charged.

From the plain terms of this section it is clear that the offence is complete when the burglar has got into the house with the intention of committing theft and it is immaterial whether or not he actually succeeds in committing such theft. A burglar who has broken into a house may be discovered and surprised before he can steal anything, but clearly he would be guilty of

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an offence under section 457 of the Indian Penal Code though no theft had been committed. Theft frequently follows an offence under section 457, but it cannot be said that it is an essential ingredient of that offence. All that is required to complete the offence under section 457 is that the burglar or house-breaker by night should have an intention to commit theft. It matters not for the purposes of that offence whether the burglar or house-breaker by night does actually carry out his intention and commits theft.

Section 460 reads as follows: "If, at the time of the committing of lurking house-trespass by night or house-breaking by night, any person guilty of such offence shall voluntarily cause or attempt to cause death or grievous hurt to any person, every person jointly concerned in committing such lurking house-trespass by night or house-breaking by night shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine."

A person may be guilty of committing lurking house-trespass by night or house-breaking by night without being guilty of theft or without having any intention to commit theft. Lurking house-trespass by night is defined in section 444 of the Indian Penal Code and house-breaking by night in section 446 of the Indian Penal Code and it is clear that theft or an intention to commit theft is in no way a necessary or essential ingredient in either of these offences. It frequently happens that lurking house-trespass or house-breaking by night is followed by theft, but the offence can be committed without theft or any intention to commit it. That being so, an offence under section 460 is not an offence which includes theft though it may frequently form part of a transaction which also includes theft. Sri Kishen, as we have stated previously, was charged only with an offence under section 460 of the Indian Penal Code.



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In our judgment neither an offence under section 457 of the Indian Penal Code nor an offence under section 460 of the Indian Penal Code is an offence which includes theft, though, as we have stated, both the offences must frequently be followed by theft and often form part of a larger transaction which may involve or include theft. However, section 239(e) of the Criminal Procedure Code only permits persons to be charged and tried together when one set are charged with an offence which includes theft whilst the other are charged with receiving or retaining or assisting in the disposal or concealment of property possession of which is alleged to have been transferred by the offence with which the first set are charged. As theft is not an essential ingredient of an offence under either section 457 or 460 of the Indian Penal Code, possession of property cannot pass as a result of either of these offences. Possession of property may pass as a result of theft following either of those offences, but it does not actually pass as a result of either of them. From the terms of section 239(e) of the Criminal Procedure Code it is in our view clear that an offence which includes theft must mean an offence of which theft is a necessary and essential ingredient. Robbery as defined by section 390 of the Indian Penal Code is clearly an offence which includes theft and so is theft in a dwelling house as defined by section 380 of the Indian Penal Code. An offence under section 382 of the Indian Penal Code includes theft and all are clearly offences by which the possession of property is transferred from one person to another. Such offences are clearly within section 239(e) of the Criminal Procedure Code and in our view only such offences are covered by that section. An offence which may be the forerunner of a theft or which may form part of a larger transaction which might involve or include theft cannot in our judgment be said to be an offence which

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includes theft. That being so, persons charged under sections 457 and 460 of the Indian Penal Code are not persons charged with offences which include theft, and consequently they cannot properly be tried with persons charged with receiving stolen property which was stolen in a theft which was committed as part of the transaction involving the other offences.

For the reasons which we have given the joinder of Mst. Sunder, Bishnu, Suraj Prasad and Pyare Lal with Mathuri, Ram Bharose and Sri Kishen in one trial was not permissible and therefore contrary to law.

As we have stated previously, it was further contended by counsel for the accused persons that even if offences under sections 457 and 460 of the Indian Penal Code were offences which included theft, there was a misjoinder in this case, because Mathuri and Ram Bharose were also charged with murder and it was conceded by the Crown that an offence under section 302 of the Indian Penal Code could never be described as an offence which included theft.

In our view, however, if persons can properly be charged and tried together under section 239 of the Criminal Procedure Code, there is nothing to prevent other charges being added against one or more of such persons if the addition of such charges is permissible by the Code.

On behalf of the accused persons reliance was placed on the case of *Sultan Ahmad v. Emperor* (1) previously cited, where it was expressly held that receivers could not be jointly charged with persons charged with an offence under section 436 and with an offence under section 457 of the Indian Penal Code. As we have stated previously, it was assumed in this case that an offence under section 457 was an offence which included theft. At page 142 DALIP SINGH, J., observes: "As regards section 239(e) the learned counsel for the Crown wishes me to interpret that section as if it read 'Persons

(1) A.I.R., 1929 Lah., 142.

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accused of offences *one of which* includes theft, extortion, etc., and persons accused of receiving or retaining, etc., may be charged and tried together.' I do not see any reason for varying the plain grammatical meaning of the section to this extent. In my opinion, the offences described in sections 457 and 436, with which a person is jointly charged, cannot be tried along with offences under sections 411 and 414 of which other persons are charged, because section 436 does not include theft or extortion, though section 457 does."

Counsel for the Crown, however, contends that if *A* and *B* can properly be tried together under section 239(e) for theft and receiving respectively, other charges not involving theft can be added against *A* if he could be tried alone in one and the same trial upon such charges as well as the charge of theft.

The case of *Niranjan v. Emperor* (1) is a clear authority for this proposition. In that case three persons were charged under section 411 with receiving stolen property and one of them was in addition charged under the same section with receiving other stolen properties within twelve months and the three accused were tried together. It was held by BENNET, J., that there was no illëgality in the trial as there was nothing in section 239 of the Criminal Procedure Code specifically stating that as regards one or more of the persons accused there should be no application to that person or persons of the previous sections of the Code such as section 234 of the Criminal Procedure Code. In that case the three persons were jointly charged and tried together under section 239(a) of the Criminal Procedure Code and the learned Judge held that there was nothing in that section or in the Criminal Procedure Code which prevented further charges being brought against one of the persons, provided the joinder of such charges was permissible under section 234 of the Criminal Procedure Code.

(1) [1934] A.L.J., 658.

Another case which strongly supports the view of BENNET, J., is the case of *Tota Meah Chaudhuri v. King-Emperor* (1). This case lays down that where several accused persons are tried together for the same offence, it is quite possible to have an alternative charge against one of such persons. At page 1108, RANKIN, C.J., states as follows: "The first objection is to the joinder of the charges in the present case. It is said that it was wrong in this case to charge the first accused alternatively under section 155 of the Indian Penal Code. It is not here disputed that if the man had been tried by himself the additional charge under section 155 would have been within section 236 of the Criminal Procedure Code, but it is said that, if these persons were all being tried together, the section which has to be regarded is section 239 and that under section 239 there is no provision made by which accused No. 1, in addition to being charged with rioting and other charges arising out of the riot, could be charged in the alternative under section 155. I cannot see that there is any necessity to read sections 239 and 236 in such a way as to produce that result. In this particular case the first accused has not been convicted under section 155. The question, therefore, is a pure question whether the trial is vitiated by the joinder in the alternative of the charge under section 155, and I must flatly refuse to lay down that where accused persons are being tried together under section 239 it is not possible to have an alternative charge against one of those accused persons. I see no necessity whatever to read this section in that manner. Section 236 deals with the question of what charges a single person may be made to meet and it says that, in certain cases, where it is doubtful which offence he has committed, you may charge him with all and you may charge him also in the alternative. The object of section 239 is not to say what charges a man may be called upon to meet but to say what

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(1) (1929) I.L.R., 56 Cal., 1106.

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persons may be charged and tried together. I see no difficulty at all in that matter." This case is a clear authority for the proposition that where persons can properly be jointly charged and tried by reason of section 239, other charges permissible by the Code may be added against one or more of such persons.

A contrary view has been expressed in the case of *Ram Sahai v. Emperor* (1) and in the case of *Ram Prasad v. King-Emperor* (2). These cases were discussed at length by BENNET, J., in the case of *Niranjan v. Emperor* (3), and it is unnecessary for us further to consider them. In our judgment the view of BENNET, J., in *Niranjan's* case, supported as it is by the case of *Tota Meah Chaudhuri v. King-Emperor* (4), is to be preferred to the view expressed in the earlier Allahabad cases. That being so, there is nothing in our view in the Code of Criminal Procedure to prevent charges being added against the thief or receiver in cases where the thief and the receiver are being jointly tried under the provisions of section 239(e) of the Criminal Procedure Code, provided that the addition of such charges against one or other of them is permitted by other sections of the Code. However, the point does not really arise in this case, because we have held that offences under sections 457 and 460 are not offences which include theft and, therefore, the accused persons could never properly be charged and tried together. We have, however, considered the point at some length in deference to the exhaustive arguments which were addressed to us upon this point.

To sum the matter up, there was no justification for the joinder of Mathuri, Ram Bharose and Sri Kishen on the one hand with the persons accused of receiving stolen property, as not one of the charges brought against Mathuri, Ram Bharose and Sri Kishen involved or included theft.

(1) (1921) 19 A.L.J., 610.  
(3) [1934] A.L.J., 658.

(2) (1921) 19 A.L.J., 796.  
(4) (1929) I.L.R., 56 Cal., 1106.

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What is therefore the effect of this misjoinder of persons in this case? It has been urged on behalf of the accused persons that the whole trial was vitiated by such misjoinder and that the convictions cannot, therefore, be sustained and must be quashed. In the past misjoinder of persons or charges has been held to be an illegality which vitiated the trial and which was a good ground for quashing convictions in such trials. Such was the course taken in the cases of *Ram Sahai v. Emperor* (1), *Ram Prasad v. King-Emperor* (2) and *Ratan Singh v. Emperor* (3) and numerous other cases in this and in other High Courts. In all these cases misjoinder of persons or charges was held to be an illegality vitiating the trial and not a mere irregularity curable under the provisions of section 537 of the Criminal Procedure Code.

Section 537 reads as follows: "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered under chapter XXVII or on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code . . . unless such error, omission, irregularity . . . has in fact occasioned a failure of justice." To this section is appended an explanation which reads as follows: "In determining whether any error, omission or irregularity in any proceedings under this Code has occasioned a failure of justice, the court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

It would appear from the record that this contention as to misjoinder of persons was never urged in the sessions court, and, if such only amounts to an error or irregularity in the proceedings, it will be difficult for

(1) (1921) 19 A.L.J., 610.

(2) (1921) 19 A.L.J., 796.

(3) (1921) 19 A.L.J., 915.



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the accused at this late stage to establish that such has occasioned a failure of justice. Further, upon the facts of this case it is quite impossible for us to hold that the misjoinder has in fact resulted in a failure of justice. The joinder of the receivers with Mathuri, Ram Bharose and Sri Kishen could not possibly prejudice the latter's case, and it was not contended before us by counsel for Mathuri and Ram Bharose that such misjoinder had affected their case in any way. It was, however, urged before us that the case of the receivers had been prejudiced by reason of the fact that they were tried together with the persons charged with murder and offences under sections 457 and 460. It was said that the introduction of the evidence concerning two brutal murders must inevitably have made the case of the receivers appear far more serious than it really was. We are unable to agree with this view and we cannot assume that a learned Judge of experience would allow his mind to be influenced by the fact that the articles received by the receivers were stolen in circumstances of great brutality. There is nothing upon the record which suggests in the slightest degree that the learned Sessions Judge allowed himself to be prejudiced in any way in dealing with the cases of the receivers by the evidence relating to the murders. In any event, it would be impossible to conduct the case against the receivers without proving that murder was committed during this burglary. To establish the case against the receivers it was necessary not only to prove that they were in possession of certain articles of jewellery but also to prove that such articles had recently been stolen, and the theft could not possibly in this case be proved without the fact being established that two murders were committed at the time of the theft. In fact the joint trial of all these accused persons was probably the most convenient if not a legal way of dealing with the matter. However, it is not necessary for us to consider this aspect of the case because we are not satisfied that the

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prosecution have established beyond all reasonable doubt the guilt of Mst. Sunder and Bishnu. We shall consider the evidence relating to these two accused persons at a later stage, and having regard to the view which we take it cannot be urged at this stage that they were prejudiced by this misjoinder.

As we have stated previously, it has not been contended before us that the misjoinder occasioned a failure of justice in the cases of Mathuri and Ram Bharose, but, even so, if the misjoinder is an illegality not curable under section 537 of the Criminal Procedure Code the trial is vitiated and their convictions must be set aside and a re-trial ordered. It is, therefore, necessary to consider whether a misjoinder of persons is or is not an error or irregularity in a charge which is curable by reason of section 537.

In the case of *Subrahmania Ayyar v. King-Emperor* (1) their Lordships of the Privy Council held that where an accused person was wrongly charged with no less than 41 offences committed within the space of two years, such joinder of charges vitiated the trial as it was clearly contrary to section 234(1) of the Criminal Procedure Code, and in their judgment their Lordships remarked as follows: "The remedying of mere irregularities is familiar in most systems of jurisprudence, but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted that this contravention of the Code comes within the description of error, omission or irregularity." That case is a clear authority for the proposition that a joinder of a large number of charges against an accused person contrary to section 234(1) is an illegality not curable by section 537 and which vitiates the trial.

(1) (1901) I.L.R., 25 Mad., 61.



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In a later case, however, namely *Abdul Rahman v. King-Emperor* (1) their Lordships of the Privy Council commented upon the earlier case of *Subrahmania Ayyar v. King-Emperor* (2), to which we have previously referred, and in discussing the effect of the misjoinder stated that "it was possible that it might have worked actual injustice to the accused". In short their Lordships in the later case appear to have thought that possibly the reason for holding that the trial of *Subrahmania Ayyar* was vitiated was not because the misjoinder of charges amounted to something more than an irregularity but because such had in fact occasioned a failure or denial of justice. The matter, however, does not rest there, because the effect of these two cases has been considered by a Full Bench of this Court in the case of *Kapoor Chand v. Suraj Prasad* (3). In this case the cases of *Subrahmania Ayyar v. King-Emperor* (2) and *Abdul Rahman v. King-Emperor* (1) were discussed at length. MUKERJI, A.C.J., who delivered the judgment of the Court, made these observations (at page 312) concerning the effect of the decision in *Abdul Rahman v. King-Emperor* (1) upon the earlier decision of *Subrahmania Ayyar v. King-Emperor* (2): "It may be that their Lordships of the Privy Council, in the later case, wanted to point out that section 537 of the Code of Criminal Procedure could not cure the defect in *Subrahmania Ayyar's* case because the Code contained the provision that an irregularity, which had worked injustice to the accused, could not be cured. But it is significant that although their Lordships of the Privy Council drew a distinction between an 'illegality' and an 'irregularity' in the earlier case, which was decided in the year 1901, the legislature did not introduce the word 'illegality' in section 537 or anywhere else in the Code, although it was amended after that year. This being the state of the law, we do not think that we

(1) (1926) 25 A.L.J., 117.

(2) (1901) I.L.R., 25 Mad., 61.

(3) (1933) I.L.R., 55 All., 301.

should introduce a distinction between 'illegality' and 'irregularity'. The sole criterion given by section 537 is whether the accused person has been prejudiced or not. The object of procedure is to enable the court to do justice, but, if in spite of even a total disregard of the rules of procedure, justice has been done, there would exist no necessity for setting aside the final order which is just and correct, simply because the procedure adopted was wrong."

There can be no doubt that this case lays down that there is no difference between an illegality and an irregularity in procedural matters, and this at first sight appears to be somewhat startling and far-reaching. In the case of *Parsotam Das v. Emperor* (1) KENDALL, J., doubted whether the Full Bench in the case of *Kapoor Chand v. Suraj Prasad* (2) really intended to lay down such a far-reaching proposition as that stated in MUKERJI, A.C.J.'s judgment. At page 1066 KENDALL, J., remarks: "It is to be noticed, however, that the Full Bench was discussing the interpretation of section 537 of the Criminal Procedure Code, under which an irregularity in procedure is not to occasion an alteration of an order passed by a court, and the Full Bench did not really discuss those passages in the Privy Council decision of 1901 or in the later one to which they refer, namely the case of *Abdul Rahman v. King-Emperor* (3), in which it has been held that a serious defect in the mode of conducting a criminal trial cannot be cured." We are unable to agree with KENDALL, J.'s view that the Full Bench were not discussing the effect of the decision in the case of *Abdul Rahman v. King-Emperor* (3) upon the earlier decision in *Subrahmania Ayyar v. King-Emperor* (4). It is clear from the judgment of MUKERJI, A.C.J., that it had been contended before the Full Bench that what had occurred in that case amounted to an illegality which could not be cured by section 537.

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(1) [1935] A.L.J., 1065.  
(3) (1926) 25 A.L.J., 117.

(2) (1933) I.L.R., 55 All., 301.  
(4) (1901) I.L.R., 25 Mad., 61.

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which, it was urged, dealt only with irregularities and not with illegalities. This argument is stated in terms at page 311 and after a statement of the argument a discussion of the two Privy Council cases immediately follows. Following that discussion comes the passage, which we have already quoted, where it is pointed out that no distinction should be drawn between an illegality and an irregularity and that the sole criterion given by section 537 is whether the accused person has or has not been prejudiced. In our judgment this Full Bench case is an authoritative statement of the law and we are bound by it. It defines the scope of section 537 and lays down that whether the defect in procedure amounts to a mere irregularity or to an illegality is immaterial. In the present case the misjoinder of persons is contrary to section 239(e) of the Criminal Procedure Code and, therefore, prohibited by law. It is in our view an illegality and not a mere irregularity, but even so it is yet curable by section 537 if it has not in fact occasioned injustice.

The dictum of MUKERJI, A.C.J., previously referred to is not in our view so startling and far-reaching as it would at first sight appear. It is true that he states that if in spite of even a total disregard of the rules of procedure justice has been done, there would exist no necessity for setting aside a final order. However, it is difficult to imagine a case where there had been a total disregard of the rules of procedure and yet justice had been done. A total disregard of the rules of procedure would in almost every case occasion a failure of justice. For example, if a Magistrate refused to record any evidence and yet convicted a person, it would be impossible for a court to hold that such a disregard of the rules of procedure had not occasioned a failure of justice. The refusal of the Magistrate in such a case to record any evidence might be an irregularity within the meaning of section 537, yet a superior court would

be bound to set aside the conviction on the ground that such irregularity must inevitably have occasioned a failure of justice.

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In our view we are clearly bound by the case of *Kapoor Chand v. Suraj Prasad* (1), and as we hold that the misjoinder has not in this case occasioned a failure of justice, the defect or illegality or whatever it may be called is curable by reason of the provisions of section 537.

Having rejected the preliminary points taken by the appellants it is now necessary to consider the evidence adduced in this case and we shall first consider the evidence against the appellants Mathuri and Ram Bharose who were charged under sections 302 and 457 of the Indian Penal Code. As we have stated previously, Sri Kishen is not before the Court and it is therefore unnecessary to deal with his case

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For the reasons which we have given we are satisfied that both the appellants Mathuri and Ram Bharose took part in this affair and, therefore, were clearly guilty of an offence under section 457. We are not satisfied that either of them actually committed murder, and that being so, they were in our view rightly acquitted of the charge under section 302. Though clearly guilty of an offence under section 457 they were not convicted under that section but were convicted under section 460 of the Indian Penal Code, though neither of them was charged under that section.

It has been contended before us that a conviction under section 460 cannot be sustained and must be set aside and that at most these appellants can only be convicted of an offence under section 457. It is argued that the offence under section 460 is a more serious offence than the one under section 457 and whereas a conviction for a minor offence is permissible where an

(1) (1933) I.L.R., 55 All., 301.

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accused person is charged with a major offence, a conviction for the latter is never permissible where the charge is only of a minor offence. Counsel for the appellants rely strongly on section 238(1) of the Criminal Procedure Code, but in our view a conviction under section 460 is abundantly justified by reason of sections 236 and 237 of the Criminal Procedure Code.

Section 236 provides that "If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences." The occurrence which took place on the night of the 17th/18th of May, 1934, consisted of a series of acts and it could not be said with any certainty before the trial which of several offences the accused were guilty of. That being so, each of the accused could have been charged with each of the offences committed during the occurrence, or they could have been charged with such offences in the alternative. Having regard to the evidence in this case, both Mathuri and Ram Bharose could have been charged under sections 457, 460 and 302 of the Indian Penal Code as well as a number of other sections, such as sections 395 and 396 of the Indian Penal Code. They were not charged, however, under section 460 of the Indian Penal Code, but it is clear that they could have been so charged.

Section 237 provides that "If, in the case mentioned in section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it." In other words in a case where it is doubtful which of several offences

a person has committed, he may be charged with all of them or with a number of them in the alternative. In such a case he may be convicted if the facts proved show that he is guilty of an offence with which he might have been charged under section 236, though in fact he was not specifically charged with that particular offence. The decision in the case of *Begu v. King-Emperor* (1) makes this abundantly clear. VISCOUNT HALDANE, who delivered the judgment of their Lordships of the Privy Council in that case, stated on page 231 after discussing section 237 of the Criminal Procedure Code: "The illustration makes the meaning of these words quite plain. A man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that *might* have been made." This is an authoritative pronouncement upon sections 236 and 237 of the Criminal Procedure Code, and they precisely cover this case. Both Mathuri and Ram Bharose might well have been charged under section 460 of the Indian Penal Code as well as under sections 302 and 457 of the Indian Penal Code and the facts proved have established an offence under section 460. They can be convicted under that section, although they were not specifically charged with that offence. In our judgment both these appellants were properly convicted under section 460, and there is no ground whatsoever for interfering with their convictions or with the sentences passed upon them. That being so, their appeal against their convictions must be dismissed.

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In our judgment the learned Sessions Judge rightly acquitted Mathuri and Ram Bharose of the offence of murder and therefore the Government Appeal is dismissed. As we have stated previously they were, however, rightly convicted under section 460 of the Indian Penal Code and their appeals as we have previously stated are dismissed.

(1) (1925) I.L.R., 6 Lah., 226.

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## APPELLATE CIVIL

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and  
Mr. Justice Bennet*

1935  
November, 28

MALLHE KHAN AND OTHERS (JUDGMENT-DEBTORS) v. GULAB  
SINGH (DECREE-HOLDER)\*

*Land Revenue Act (Local Act III of 1901), sections 141, 146, 184—Land revenue "first charge" on the land—Agra Tenancy Act (Local Act III of 1926), section 221—Lambardar's decree against co-sharer for share of revenue—Execution sale of the share and purchase by lambardar—Whether he gets priority over a previous mortgagee decree-holder on the ground that land revenue is the first charge on the land.*

Section 141 of the Land Revenue Act is not intended to apply to a decree-holder under section 221 of the Agra Tenancy Act. It is only in the case of proceedings for an arrear of revenue taken under the Land Revenue Act that section 141 of that Act will apply. The land revenue is a first charge on the land as laid down in section 141 when the revenue is payable to Government and proceedings are taken under section 146 of the Act for its realisation, or when the Collector takes proceedings under section 184 of the Act on behalf of a lambardar. Where the lambardar himself brings a suit against a co-sharer under section 221 of the Agra Tenancy Act for realisation of revenue and in execution of the decree purchases the co-sharer's share, he gets no priority by virtue of section 141 of the Land Revenue Act as against the holder of a previous mortgage decree against that share.

Mr. H. C. Mukerji, for the appellants.

Mr. Nanak Chand, for the respondent.

SULAIMAN, C.J., and BENNET, J.:—This is a Letters Patent appeal by three persons, but learned counsel stated to us that he addressed us only in regard to appellant No. 1 who was the lambardar. The appellant claims that as lambardar he brought a suit against Mst. Ram Piari, the appellant No. 3 for arrears of revenue which he had paid on her behalf and obtained a decree under section 221 of the Agra Tenancy Act of 1926. He put her share up to auction and on the

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\*Appeal No. 12 of 1935, under section 10 of the Letters Patent.



25th of May, 1933, he purchased 1/10th share in the property in suit and obtained possession. The opposite party is a decree-holder who obtained a simple mortgage decree on the 27th of November, 1931, against the shares of Chandan Singh and his wife Mst. Ram Piari, and a final decree on the 5th of November, 1932, and on the 21st of January, 1933, he applied for execution of his final decree and the decree was sent to the Collector for sale of the property. The appellant before us made an objection to the effect that owing to his having purchased the 1/10th share on account of a decree for arrears of revenue paid by him he has a prior charge within the wording of section 141 of the Land Revenue Act which states as follows: "In the case of every mahal the revenue assessed thereon shall be the first charge on the entire mahal, and on the rents, profits or produce thereof. The rents, profits or produce of a mahal shall not be applied in satisfaction of a decree or order of any civil court until all arrears of revenue due in respect of the mahal have been paid."

The argument for the appellant is that under this section the revenue is a first charge on the entire mahal, and as he got a decree for arrears of revenue against the co-sharer and obtained possession of the share in execution sale of that decree therefore he can hold up his charge against the present decree-holder on the mortgage decree although in fact the mortgage decree was prior to the decree for arrears of land revenue. The question is whether section 141 of the Land Revenue Act is intended to apply to a decree-holder under section 221 of the Agra Tenancy Act. If the lambardar had desired to proceed under the Land Revenue Act he could have applied under section 184 of that Act to the Collector to recover the amount which he had paid, "as if it were an arrear of revenue payable to Government". In that case the Collector could have taken any of the proceedings laid down in section 146. But if the Collector had desired to sell the share he

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would have had to obtain sanction from the Board of Revenue under section 160. The procedure adopted by the lambardar has resulted in the sale of the share without such sanction from the Board of Revenue. We are of opinion that the language of section 184 shows that the right of the lambardar is not the same as the right of Government and for this reason the words are used, "as if it were an arrear of revenue payable to Government". It is only in the case of proceedings for an arrear of revenue taken under the Land Revenue Act that section 141 of the Land Revenue Act will apply. There is nothing whatever in the Land Revenue Act or in the Tenancy Act to indicate that section 141 of the Land Revenue Act can apply to section 221 of the Tenancy Act. Learned counsel failed to produce any ruling to show that any court has ever held that section 141 of the Land Revenue Act can apply to section 221 of the Tenancy Act. We are of opinion that the first charge of the Government laid down in section 141 of the Land Revenue Act is a first charge of the revenue when the revenue is payable to Government or when the Collector takes proceedings under section 184 of that Act on behalf of a lambardar. We consider that the prior charge cannot be applied in the present case to the decree obtained by the lambardar under section 221 of the Tenancy Act. That being so, we consider that the judgment of the learned single Judge of this Court is correct and we dismiss this Letters Patent appeal with costs. We may add that we consider that the execution court would exercise a proper discretion in the present case if it put to sale the other property and did not put to sale this 1/10th share except in case the other property proved insufficient.

## REVISIONAL CIVIL

*Before Mr. Justice Collister and Mr. Justice Bajpai*

MISRA RANGNATH (APPLICANT) *v.* MISRA MURARI LAL 1935  
November, 29  
(OPPOSITE-PARTY)\*

*Guardians and Wards Act (VIII of 1890), section 41(3) and (4)—Powers of court in respect of accounts delivered by ex-guardian—Detailed inquiry or investigation not contemplated—Remedy of ex-minor by suit—Order for payment of a sum found due after investigation ultra vires—Revision—Jurisdiction—Discharge to ex-guardian—Effect of discharge—Guardians and Wards Act, sections 34(c), (d) and 34A.*

The correct interpretation of section 41(3) of the Guardians and Wards Act is that the Act does not contemplate a detailed inquiry by the court into the matter of accounts delivered by the ex-guardian of a ward who has attained majority, but only a summary investigation. After the cessation of minority the ex-ward has of course the right to bring a suit against the ex-guardian for rendition of accounts; and it is clear therefore that no duty has been cast nor power conferred on the court to make detailed inquiry or investigation into the accounts delivered by the ex-guardian under section 41(3). If the court makes a detailed investigation and as a result thereof arrives at a certain sum as being due from the ex-guardian and orders him to pay it, the order is without jurisdiction and a revision lies, the order not being appealable under section 47.

A consideration of section 34(c) and (d) of the Act points to the same conclusion as to the intention of the Act regarding the scrutiny of the guardian's accounts. Accounts are exhibited under section 34 while the ward is a minor and the powers of the guardian have not ceased; and many legal difficulties which would otherwise arise are avoided, and there is no real difficulty, if all that the court does is to look into the accounts in a summary manner and see that the guardian has not incurred any expenditure which was prohibited by the court and has generally acted according to the directions given by the court. The auditor appointed under section 34A will be of some assistance to the court in order to check the accounts in the above light. If the accounts are unsatisfactory or if the guardian disobeys any directions given under section 34(d) the court has ample powers under sections 35 and 36 to sanction a suit by a proper

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\*Civil Revision No. 184 of 1934.

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person and relief can be given to the minor, and under section 37 the general liability of the guardian as trustee is preserved.

*Held*, further, without deciding the question whether a discharge given to the ex-guardian under section 41(4) would or would not have the effect of preventing a suit against him by the ex-minor, that the proper thing for the court, upon an application for discharge, is to give notice to the ex-minor, and if any objections are raised by him which *prima facie* appear to the court to be of some substance, to refuse the discharge and direct the ex-minor to obtain redress by a suit.

Mr. B. Malik, for the applicant.

Mr. Ram Nama Prasad, for the opposite party.

COLLISTER and BAJPAI, JJ.:—An important question of law is raised in this revision, but before we discuss the same it might be of some advantage if the facts are stated in some detail. On the 30th of June, 1923, Misra Rangnath, the applicant before us, applied to be appointed a guardian of Misra Murari Lal, the opposite party. The certificate was granted on the 1st of August, 1923. The minor was a resident of Muttra and he had some property of his own and further he was a trustee of an endowment along with certain other persons, but in the application for guardianship only the private property of the minor was disclosed and no mention was made of the property of which the minor happened to be a trustee. On the 7th of August, 1930, the minor attained majority and on the 7th of February, 1931, he applied that the guardian be directed to render accounts. Mr. Allen, the then District Judge, was of the opinion that either the guardian should file an account or the minor may file a suit. This opinion was expressed on the 14th of April, 1931, and on the 16th of May, 1931, the guardian filed accounts for the period 1927 to 1930, accounts of previous years having already been filed. On the 15th of August, 1931, Murari Lal filed objections to the accounts and he alleged that a large sum was due to him and that the guardian had not disclosed the income that accrued from the endowed property. The reply of the guardian was that accounts could not be

gone into in the miscellaneous proceedings and that as a matter of fact a small sum was due to the guardian. Mr. Mushran, the District Judge, appointed Babu Mukat Behari as auditor under section 34A of the Guardians and Wards Act to audit the accounts. The auditor submitted his report on the 17th of December, 1931, stating that no definite conclusions were possible, because the accounts of the guardian were not reliable, and expressed an opinion that as Murari Lal contemplated a suit no further inquiry was desirable. On the 26th of February, 1932, Mr. Smith, the District Judge, held that he had jurisdiction to go into the matter of accounts and that the auditor be asked if he was prepared to give a definite report. On the 12th of October, 1932, the auditor submitted a second report which took the shape of notes criticising the accounts, but even in this report it was not shown as to what sum was due from the guardian in the result. Several objections were taken to this report by the guardian and all of them were sent down to the auditor by the learned District Judge. On the 23rd of September, 1933, the auditor submitted a third report and the District Judge transferred the case on the 21st of November, 1933, to the Additional Subordinate Judge who took up the case on the 25th of November, 1933, and he held that the guardian should not be given any further time for objections and that his previous objections had already been dealt with in the auditor's report. He, therefore, directed the office to make a calculation on the basis of the report of the auditor and ordered that the guardian should pay what was found to be due by the office. The office made a calculation and on the 13th of February, 1934, the Additional Subordinate Judge passed a formal order on the basis of the office report to the effect that a sum of Rs.1,757-1-10 should be paid by the guardian to Murari Lal.

The guardian has filed the present application in revision against the said order and contends firstly that

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the entire proceedings in the court below are without jurisdiction, in the sense that the Act does not contemplate a detailed inquiry into the matter of accounts but only a summary investigation, and secondly that in any event they are wholly irregular inasmuch as the court has relied entirely on the auditor's report and has not adjudicated upon the objections of the guardian judicially and that proper opportunities were not given to the guardian to object to the auditor's report.

The first question is a question of some importance and we propose to discuss it at some length. While it is contended on behalf of the guardian that on an application of the present kind filed by the minor who has attained majority, which must be deemed to be an application under section 41(3) of the Act, the only direction which the District Judge can give is to order the guardian to deliver any property in his possession or control belonging to the ward or any accounts in his possession or control relating to any past or present property of the ward and that in this connection the property or accounts which can be delivered are those which are admitted by the guardian, the contention of the opposite party is that on the accounts furnished by the guardian the court ought to institute a detailed inquiry and give proper directions to the guardian on the basis of such an inquiry.

Authorities on this point are by no means agreed. On the one hand it is said that proceedings under the Guardians and Wards Act are more or less summary and do not contemplate a detailed inquiry. It is further said that if the District Judge were to embark upon an elaborate inquiry on an application under section 41(3) and come to the conclusion that a certain sum is due from the guardian to the minor, all that he can do is to direct the guardian to pay the said sum to the ward, but if the guardian refuses to do so, the order cannot be executed except that certain disciplinary action can be taken under section 45(c) and the guardian can be

fined in a sum not exceeding Rs.100 and in case of recusancy in another sum, the aggregate not exceeding Rs.500, and he can be detained in the civil jail until the order is obeyed. The liability of the guardian might be fixed under the inquiry in a very large sum and all that the Judge can do is to fine the guardian in a sum not exceeding Rs 500 (it is doubtful if this can be awarded as compensation to the minor) and to detain the guardian in the civil jail and this will be but poor consolation to the minor. The order of payment is not appealable under section 47 except by straining the language of section 43 and saying that such an order regulates the conduct of a guardian. The order will not ordinarily be open to revision under section 115 of the Civil Procedure Code and under section 48 of the Act it will be final and not be liable to be contested by suit or otherwise. If a suit is brought by the minor after attaining majority against the guardian for rendition of accounts and for payment of the money found due, the order of the District Judge on such rendition in the summary inquiry under section 41(3) might or might not be held to be *res judicata*. If it is held to be *res judicata*, it would work very harshly, because after all it is a decision under an Act where the proceedings are more or less summary and the order could not be tested by way of appeal, and if it is not held to be *res judicata* the elaborate inquiry conducted by the District Judge would be wasted. These are the difficulties which surround the view that is contended on behalf of the opposite party in the present case.

On the other hand it is contended on behalf of the minor that if all that the District Judge can do is to direct the guardian to deliver such property belonging to the ward or such accounts relating to any past or present property of the ward as are admitted by the guardian to be in his possession, the necessity of directing the guardian to file accounts is reduced to a farce and the guardian might very well cook accounts and the court is

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powerless in the matter. It is also said that although the present application by the minor was under section 41(3) after the attainment of majority, section 34(c) and (d), which comes into play when the minor is still a minor, should also be considered, and it is contended that in the interest of consistency there should be no difference in interpreting the two provisions. It is said that the accounts exhibited by the guardian under section 34(c) in the court ought to be true and genuine accounts and the balance due from the guardian, which has got to be paid by him on those accounts under section 34(d), should be the balance discovered not on the basis of the arbitrary accounts submitted by the guardian, but which will be found due after scrutiny. In this connection reliance is placed on section 34A which was added by the Amending Act XVII of 1929, and the argument is that if the court has the power to appoint an auditor it is obvious that a thorough checking of the accounts was contemplated. Another contention is that under section 41(4) when the guardian has delivered the property or accounts which are admitted by him to be in his possession, the court will declare him to be discharged from his liabilities and the minor will have then no remedy by way of a suit, which could hardly be the intention of the legislature.

We have given anxious consideration to the difficulties that have been pointed out to us in connection with the two contending views, and we have come to the conclusion that the better view and the view attended with least difficulty is the one which is advanced by the guardian. Accounts are exhibited under section 34 when the minor is still a minor and the powers of the guardian have not ceased. There is no real difficulty if all that the court did were to look into the accounts in a summary manner and see that the guardian has not incurred any expenditure which was positively prohibited by the court and has generally acted according to the directions given by the Judge. The auditor appointed under section 34A



will be of some assistance to the court in order to check the accounts in the above light. If the accounts are unsatisfactory or if the guardian disobeys any direction given under section 34(d) the court has ample powers under sections 35 and 36 to sanction a suit by a proper person and relief can be given to the minor, and under section 37 the general liability of the guardian as trustee is preserved. The guardian can also be removed by the court. After the cessation of minority the ward who has attained majority has of course the right to bring a suit against the guardian for rendition of accounts and the mere fact that the guardian has delivered such property and accounts of the minor as are admitted by him to be in his possession will not absolve him from liability unless he has obtained a discharge, and the proper thing for a court, when the guardian applies for a discharge, is to issue a notice to the minor. If the minor has no objection, the discharge may be given and then there is no hardship if the minor is precluded from instituting a suit later on. He is of full age, able to look after his affairs and he alone is to blame if he, after understanding the accounts and receiving such property as the guardian delivers, chooses to give an acquittance to the guardian. If, however, he has any objections, he will naturally, in pursuance to the notice issued by the Judge, make an attempt to substantiate his objections, and the court again in a summary manner may look into the objections and if it is satisfied *prima facie* that there is some force in the objections it will refuse to declare the guardian discharged from his liabilities under clause (4) and direct the minor to obtain redress by means of a suit. The guardian can have no reasonable grievance, for after all the suit must be instituted within three years of attaining majority and the discharge will be given on the basis of the decision of the regular suit and the guardian cannot say that the discharge has been unnecessarily delayed. It was also contended on behalf of the guardian that a discharge under clause (4) of

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section 41 is a discharge only for the purposes of the Act and does not prevent a suit by the minor, but in the view which we have taken of the matter it is not necessary for us to consider this argument. It is significant that the words used in section 41(3) are "to deliver . . . any accounts in his possession" and we doubt whether the legislature would have employed such language if the intention had been that the ex-guardian should render an account of his stewardship. Further, we find it difficult to believe that if the legislature had contemplated that the District Judge should have power to fasten liability up to any amount upon the late guardian, it would have expressly provided that there should be no appeal against such order. On the whole, apart from authority, we are of the opinion that the contention advanced on behalf of the guardian on the interpretation of sections 41(3) and 34(c) and (d) is correct.

We now propose to consider the cases that were cited before us at the bar. In the case of *Nabu Bepari v. Sheikh Mahomed* (1) it was held by a Full Bench that an order for the payment of a sum found to be due *on an investigation* under section 41(3) was objectionable and without jurisdiction. It was further held that although the court has certain summary powers under section 34 of the Guardians and Wards Act, yet even such summary powers cease after the termination of guardianship. In the case of *Jagannath Panja v. Mahesh Chandra Pal* (2) where section 34 was being interpreted, it was held that the only order which a court could pass under section 34(d) was for the payment of the balance on the accounts exhibited by the guardian and not on the basis of accounts as may be discovered after an elaborate investigation. In *Subbarami Reddi v. Pattabhirami Reddi* (3) it was held that the property to be delivered under section 41(3) is the property which is actually in the possession of the guardian and not what he should have with him according to the

(1) (1900) 5 C.W.N., 207.

(2) (1916) 21 C.W.N., 688.

(3) (1926) I.L.R., 50 Mad., 80.

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opinion of the court and so also the accounts to be delivered are those which have been actually kept by him and not those which according to the court are the correct accounts. In this view the learned Judges followed certain earlier decisions of their own court and the case of *Hari Krishna Chettiar v. Govindarajulu Naicker* (1) may be particularly mentioned, because there also a similar view was taken, but in that case it was further held that an order against a guardian regarding liability not admitted by him may be treated as one under section 43 and treated as appealable. But we, with great respect, as pointed out before, are of the opinion that this will amount to some strain on the language, and the learned Judges of the Madras High Court also conceded that it may not be quite the right thing to say that an order under section 34(d) is "an order regulating the conduct or proceedings" of a guardian. In the case of *Motilal Kalyandas v. Bai Ichha* (2) it was held that section 41(3) of the Guardians and Wards Act provides for a very summary procedure which can only be applied without hardship in cases where there is no room for reasonable doubt as to the guardian being in possession of certain property of the ward. The clause refers to the property in the actual possession or control of the guardian and does not include all property for which he may, by the application of the law of principal and agent, be made legally responsible. In *Muhammad Khadim Husain v. Ahmad Hasan* (3) a Bench of this Court held that "A District Judge who has appointed a guardian of a minor and directed him to file accounts should look into those accounts from time to time during the minority, but there is no obligation on him after the minor has attained majority to review the accounts or to direct the guardian to render accounts afresh. He has, however, express power to direct the ex-guardian to hand over the posses-

(1) A.I.R., 1926 Mad., 478.

(2) (1908) 11 Bom., L.R., 90.

(3) (1917) 39 Indian Cases, 175.

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sion of all papers and accounts which are in the guardian's possession to the ex-minor, who can then consider the accounts and take such steps as he may be advised in respect thereto." In *Sadhu Singh v. Mehar Singh* (1) it was held that under section 41(3) a court cannot compel the guardian of a minor to pay to the minor any sum found due from the guardian after an inquiry into the accounts. The guardian is only liable to deliver any property in his possession or control belonging to the ward or any accounts in his possession or control relating to any past or present property of the ward. It was pointed out that the words "or his representative" in section 41(3) lend support to the above view and the learned Judge observed: "Surely it cannot be supposed that if the deceased guardian's accounts were wrong the court could compel the representative of the guardian to pay into court any sum found due after an investigation." In *Hoondomal Chhabaldas v. Nazir, Judicial Commissioner's Court* (2) the learned Judicial Commissioners held after reviewing several authorities that the legislature has neither expressly nor impliedly given power to the court to record a definite finding as to the exact amount due by the guardian as a result of an inquiry binding upon the guardian and to compel its payment; and if there is a definite finding by the court as to the amount which the ex-guardian has to pay as a result of the inquiry, to that extent the finding is not warranted by the provisions of the Act and is without jurisdiction. They also pointed out that the very fact that this provision applies not only to the ex-guardian but to the legal representative of a deceased guardian makes it clear that the only obligation imposed on a guardian or the legal representative of a deceased guardian, as the case may be, is to hand over any such property as is in his possession or control and not such property as has disappeared or has passed out of his possession or control and likewise to hand over such

(1) A.I.R., 1931 Lah., 68.

(2) A.I.R., 1930 Sind, 43.

accounts as are in his possession irrespective of such accounts being correct or not. They said that there was nothing in section 34 also to warrant the suggestion that the expression "balance due from him on those accounts" is necessarily intended to empower the court to compel the guardian to pay into the court not the sum which he admits to be due at the foot of the account exhibited by him but the sum which the court finds on an inquiry held by it to be due. The position, therefore, is that the High Courts of Calcutta, Madras, Bombay and Lahore, the Court of the Judicial Commissioner of Sind and in one case this Court have taken the view at which we ourselves have arrived independently.

It remains now to consider the cases that support the contrary view. In *Sita Ram v. Mst. Govindi* (1) WALSH, A.C.J., was of the opinion that the power of a court in dealing with accounts exhibited by a guardian was not limited by such balance as the guardian chooses to show therein nor is the disciplinary jurisdiction of the court limited to directing repayment of sums actually in the hands of the guardian. If, therefore, the guardian filed an account which was not a just and true account, and was surcharged by the court in any amount, the court could procure the repayment of the amount surcharged by means of the procedure prescribed by section 45 of the Guardians and Wards Act. The learned Judge cited certain illustrative cases to show that the opposite view would be obviously unfair; for instance it was pointed out that if the guardian in the account said: "As to a sum of Rs.2,000 I yesterday paid this away to an insistent creditor of mine to prevent my arrest, and I am therefore unable to produce this sum of money and the balance due from me is eight annas." Another illustration of a contumacious guardian deliberately throwing

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(1) (1924) I.L.R., 46 All., 458.

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away a box of rupees amounting to half a lakh belonging to the minor into the Ganges was also mentioned in the judgment. These are extreme cases and it might be possible to hold that the Rs.2,000 paid by the guardian to an insistent creditor of his and a box containing half a lakh of rupees thrown into the Ganges is admitted by the guardian to be in his possession, but the other difficulties pointed out by us were not taken into consideration. The difficulty of the order being unappealable was mentioned and not answered. In *Saiyid Muhammad Fariduddin v. Saiyid Ahmad Abdul Wahab* (1) it was held that the court had jurisdiction to investigate the accounts exhibited by a guardian under section 34(c), to amend them by striking out objectionable items, and to direct the guardian to pay the balance due on a true and just account, and on his failure to pay the balance as found by the court under section 34(d) the court had jurisdiction to impose a fine on the guardian under section 45. The learned Judges followed the case in *Sita Ram v. Mst. Govindi* (2) mentioned just now, but for the reasons given by us in an earlier portion of our judgment and by other learned Judges of other High Courts, with great respect, we find ourselves unable to agree with that view.

Two other points were raised by learned counsel for the opposite party and we might dispose of them at this stage. It is said that on the 26th of January, 1932, Mr. Smith, the then District Judge, held that he had jurisdiction to go into the accounts in a detailed manner and that that decision operated as *res judicata* and prevents the guardian from agitating the same point now. We are of the opinion that there is no force in this contention. The order of the learned District Judge was an interlocutory order and could neither be appealed against under section 47 nor could a revision be filed under section 48 read with section 115 of the

(1) (1927) I.L.R., 7 Pat., 144.

(2) (1924) I.L.R., 46 All., 458.

Civil Procedure Code. The matter had not been finally decided by the court and the guardian is not prevented from raising the point now when a final order directing the payment of a definite sum has been passed. The next point that was urged was that the order, dated the 25th of November, 1933, against which the present revision has been filed is also an interlocutory order and as such we should not interfere. There is no force in this contention as well, because although it is quite true that the judgment that has been filed along with the application in revision is the judgment, dated the 25th of November, 1933, which might be said to contain an interlocutory order only, yet the applicant has filed with that judgment a copy of the formal order, dated the 13th of February, 1934, by which the learned Subordinate Judge directs Rangnath Misra to pay the sum of Rs.1,757-1-10 to Murari Lal Misra. It does not appear that the learned Judge after calling for a calculation from the office on the basis of the auditor's report passed any judgment excepting the formal order, dated the 13th of February, 1934, directing the payment of the sum mentioned above, and both the judgment, dated the 25th of November, 1933, and the formal order, dated the 13th of February, 1934, have been filed along with this application in revision which could under the circumstances be deemed to be an application against the final order of the 13th of February, 1934. We, therefore, overrule the two preliminary objections advanced on behalf of the opposite party. We have not thought it necessary to consider the question as to how far the order of the court below is vitiated by material irregularity, in the sense that it has not arrived at any independent decision of its own on the objections of the guardian but has thought fit to rely on the report of the auditor alone, nor have we found it necessary to consider whether in the accounts the profit arising out of the endowed property which was not mentioned in the application for guardianship could be taken into

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consideration, as indeed it has been, under the auditor's report and the order of the learned Judge.

For the reasons given above, we allow this application, set aside the orders of the court below, dated the 25th of November, 1933, and the 13th of February, 1934, and direct the court below to pass appropriate orders in the case in view of the observations made in our judgment, and if any property or accounts belonging to the ward was admittedly in the possession of the guardian he should be ordered to deliver the same to the ex-minor and if the guardian applies for a discharge the court should refuse to give such a discharge as it is obvious that the minor objects to, and the court is not satisfied with, the accounts submitted by the guardian, unless a suit by the minor for rendition of accounts is barred by time now. The minor should try and obtain redress by means of a regular suit and the question of discharge will naturally abide the result in such a suit. The guardian, we understand, claims a certain sum from the ex-minor, and he can also, if so advised, institute a suit for the recovery of the same. Under the circumstances of the case we direct the parties to bear their own costs in the court below and in this Court.

### APPELLATE CIVIL

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Before Mr. Justice Harries and Mr. Justice Rachhpal Singh

ANTU RAI AND OTHERS (DEFENDANTS) v. RAM KINKAR RAI  
 AND ANOTHER (PLAINTIFFS)\*

*Civil Procedure Code, order XXII, rule 5—Dispute among several persons as to who is the legal representative of a deceased appellant—Order deciding one of them to be the legal representative—Subsequent suit between same persons regarding succession to the deceased person—Res judicata.*

A decision under order XXII, rule 5 of the Civil Procedure Code of a dispute as to which of several persons is the heir and legal representative of a deceased appellant is a decision in a

\*First Appeal No. 42 of 1932, from a decree of Krishna Das, Subordinate Judge of Ghazipur, dated the 9th of January, 1932.



summary proceeding for the purpose of continuance of the appeal, and can not operate as *res judicata* in a subsequent suit between the same persons regarding succession to the property of the deceased person, which property was not in suit in the earlier litigation. *Raj Bahadur v. Narain Prasad* (1), dissented from.

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Dr. K. N. Katju and Messrs. A. P. Pandey and Janaki Prasad, for the appellants.

Mr. B. E. O'Connor, Dr. N. P. Asthana and Messrs. M. L. Chaturvedi and B. N. Sahai, for the respondents.

HARRIES and RACHHPAL SINGH, JJ.:—This is a defendants' first appeal against a decree for possession passed by the learned Subordinate Judge of Ghazipur. The plaintiffs in the suit claimed possession of certain properties specified in schedule A of the plaint and that claim was substantially decreed, hence the present appeal.

The plaintiffs claimed the properties as being the reversioners of one Gopal Rai deceased who died whilst still a minor on the 14th of December, 1918. At the date of his death the plaintiffs alleged that their father Sheo Tahal Rai was the nearest heir and was thus entitled to the estate by right of inheritance. Sheo Tahal Rai, however, admittedly died some time after Gopal Rai and the plaintiffs as his only sons now claim that they are entitled to the property as representing their father. After much litigation in the revenue courts the defendants obtained mutation of their names in the revenue papers, hence the plaintiffs were compelled to bring this suit for possession of the properties.

The defendants' case was that the plaintiffs were not the nearest heirs of Gopal Rai, but on the contrary they were only very distantly related to the deceased. They allege that they are the nearest heirs and are therefore entitled to Gopal Rai's property by right of inheritance. In answer to these contentions of the defendants the plaintiffs replied that the defendants were in any event estopped from setting up that they were the nearest heirs

(1) (1926) I.L.R., 48 All., 422.



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of Gopal Rai deceased and further that the issue as to who were the nearest heirs of Gopal Rai deceased had already been decided against the defendants and in favour of the plaintiffs and that the matter was therefore *res judicata*. A number of other subsidiary issues were raised in the case, but it is not necessary to refer to them in this judgment as the points have not been pressed by one side or the other in this appeal.

\* \* \* \* \*

The plaintiffs have contended in this appeal that the defendants are estopped from alleging that they are the nearest heirs of Gopal Rai deceased. It is urged that an order of the Subordinate Judge of Ghazipur, dated the 9th of December, 1919, has once and for all determined that the heirs of Gopal Rai deceased are the plaintiffs. This was an order passed *inter partes* and it is claimed that therefore the defendants are barred from further agitating the matter.

It appears that Gopal Rai was a party in a suit No. 100 of 1917 which was decided against him and he appealed and became appellant in appeal No. 2 of 1918. During the pendency of the appeal Gopal Rai died and application was made by a number of persons to be substituted as appellants in his place. Sheo Tahal Rai, the father of the plaintiffs, and the defendants made such applications and the matter was decided eventually by the learned Subordinate Judge of Ghazipur who held upon the evidence which had been adduced before him that Sheo Tahal Rai, the father of the present plaintiffs, was the nearest heir and ordered that his name be brought on the record in place of Gopal Rai deceased. This was a summary proceeding, but it has been urged before us that the decision of the learned Subordinate Judge concludes the matter and the question as to who is entitled to succeed Gopal Rai deceased is now *res judicata*.

It is to be observed that counsel in the lower court never claimed that this order operated by way of *res*

*judicata* but merely urged that it had some evidentiary value in support of the plaintiffs' case. However, it is urged before us that this order does operate as a complete bar and wholly estops the defendants from setting up their present contention that they are in fact and in law the persons entitled to succeed to Gopal Rai.

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Counsel for the appellants relies upon the case of *Raj Bahadur v. Narain Prasad* (1). In that case a Bench of this Court decided that where a party died during the pendency of a suit and the cause of action survived, the court was entitled to decide the question of the legal representative of the deceased without referring the parties to a separate suit and the decision was binding on the parties and would operate as *res judicata*. In that case reference is made to an earlier case of this Court, viz., *Parsotam Rao v. Janki Bai* (2), in which a contrary view is taken. The report, however, of this case does not clearly set out the facts but the Court does appear to have held that a decision in a summary proceeding that certain persons are entitled to be substituted as personal representatives of a deceased party to a suit is not a final determination of the matter and does not constitute a bar on the ground of *res judicata*. It will therefore be seen that the decisions of this Court upon the question are conflicting.

However, in the case of *Samsarivsa Sarvathi Palekhan v. Pathumma* (3) a Bench of the Madras High Court held that the question whether a person should be admitted as the legal representative of a deceased plaintiff to continue a suit cannot be regarded as one of the questions arising for the decision of the suit itself. That Bench expressly held that an order such as the order relied upon in this present case does not operate as a bar and does not amount to *res judicata*. A similar view has also been taken by the Judicial Commissioners' Court, Nagpur, in the case of *Musammat Laxmi v.*

(1) (1926) I.L.R., 48 All., 422. (2) (1905) I.L.R., 28 All., 109.  
(3) (1913) 20 Indian Cases, 950.

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*Ganpat* (1). In that case KOTVAL, A.J.C., held that an order rejecting an application to be brought on the record as the legal representative of a deceased appellant is not a decree and does not constitute *res judicata*.

The same view has also been taken by a Bench of the Lahore High Court in the case of *Chiragh Din v. Dilawar Khan* (2). In that case it is expressly laid down that where in a proceeding under order XXII, rule 5 a person is or is not held to be the legal representative of a deceased party, the same question can be re-agitated in a separate suit and is not barred by the rule of *res judicata*.

From the above it will be seen that there is a preponderance of authority against the plaintiffs' contention. The order of the learned Subordinate Judge substituting Sheo Tahal Singh, the father of the present plaintiffs, in place of Gopal Rai was an order passed under order XXII, rule 5 of the Civil Procedure Code and it was passed in the course of a suit which did not concern the property in dispute in this case. In our judgment such an order cannot possibly be held to debar the present defendants from alleging that they as the nearest heirs of Gopal Rai are entitled to succeed to his property. The issue involved in the present case is a very different issue from that involved in the summary inquiry into the question as to who should be substituted for Gopal Rai as appellant in the appeal during the pendency of which he died. The facts of the Allahabad case of *Raj Bahadur v. Narain Prasad* (3), cited above, which appears to favour the present plaintiffs' view are very different from the facts of the present case. However, if it was intended to lay down in that case that a decision in a summary inquiry under order XXII, rule 5 of the Civil Procedure Code for ever barred any one again claiming property as the heir of the deceased party in the suit, then we respectfully dissent from it. In

(1) A.I.R., 1921 Nag., 23.

(2) A.I.R., 1934 Lah., 465.

(3) (1926) I.L.R., 48 All., 422.

our judgment the view expressed in the earlier Allahabad case, viz., *Parsotam Rao v. Janki Bai* (1) previously cited, is to be preferred to the later case. The view that an order passed under order XXII, rule 5 does not operate as *res judicata* is supported by abundant authority in other High Courts and that being so we hold that the order passed by the learned Subordinate Judge of Ghazipur in appeal No. 2 of 1918 does not operate as a bar to the present contention of the defendants.

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For the reasons which we have given above we are satisfied that Gendu Rai was not a brother of Nihal Rai and therefore that the plaintiffs were not related to Gopal Rai in the manner suggested by them. Further we are satisfied that Gendu Rai, the ancestor of Gopal Rai deceased, belonged to an entirely different branch of the family which included the present appellants. In our judgment the learned Subordinate Judge was not justified in coming to the conclusion to which he did and that being so his decision cannot stand. In our judgment the defendants have established their right to this property and that being so the plaintiffs have no claim whatsoever to it and their claim should have been dismissed.

In the result, therefore, we allow this appeal and set aside the decree of the learned Subordinate Judge and dismiss the plaintiffs' claim.

### REVISIONAL CRIMINAL

*Before Mr. Justice Allsop*

EMPEROR v. MUHAMMAD KHALIL\*

*Criminal Procedure Code, section 139A—Scope of inquiry—*  
*Summary inquiry whether denial of the public right is*  
*frivolous or otherwise—Final decision of question of title*  
*not aimed at.*

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\*Criminal Reference No. 802 of 1935

(1) (1905) I.L.R., 28 All., 109.

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The duty of a Magistrate under section 139A of the Criminal Procedure Code is merely to see whether the denial of the public right is frivolous or not. If the person who denies that right is able to produce some evidence which *prima facie* there is no reason to disbelieve, it is not for the Magistrate to examine evidence on the other side by way of rebuttal and so forth and attempt to arrive at some final decision as to whether the land is or is not public land. Questions of title of this kind are obviously not intended to be decided in summary inquiries before a Magistrate; these are matters which should be left to the decision of the civil court.

Mr. *Saila Nath Mukerji*, for the applicant.

Mr. *Mukhtar Ahmad*, for the opposite party.

The Assistant Government Advocate (*Dr. M. Waliullah*), for the Crown.

AILSOP, J.:—This is a reference by the learned Sessions Judge of Azamgarh recommending that an order passed by a Magistrate under the provisions of section 133 of the Code of Criminal Procedure should be set aside in revision. An application was made to the Magistrate that one Muhammad Khalil had gathered materials for building a house on a public place used by the public for recreation in the town of Mau. The Magistrate issued a provisional order under section 133 of the Code of Criminal Procedure. Muhammad Khalil then appeared and denied that the place was a public place at all. He said that the land was his own and that he had bought it from the zamindar. The Magistrate purported then to hold an inquiry under section 139A of the Code of Criminal Procedure. Muhammad Khalil produced the *karinda* of the zamindar and proved that he had bought the land.

It may be that the Magistrate is right in thinking that Muhammad Khalil had no right whatsoever to this land and that the land was really the property of the public or that the public was entitled to use it, but it seems to me that the learned Magistrate has misdirected himself by thinking that it was his business in an inquiry under section 139A of the Code of Criminal Procedure

to decide whether Muhammad Khalil had established that the land was not public land. It is obvious that questions of title of this kind are not intended to be decided in summary inquiries before a Magistrate. These are matters which should be left to the decision of the civil court where the case can be properly fought out. The duty of a Magistrate under section 139A of the Code of Criminal Procedure as I understand it is merely to see whether the denial of the public right is frivolous or not. If the person who denies that right is able to produce some evidence which *prima facie* there is no reason to disbelieve, it is not for the Magistrate to examine evidence on the other side by way of rebuttal and so forth and attempt to arrive at some final decision. There does not appear any *prima facie* reason for thinking that the witnesses produced by Muhammad Khalil were absolutely unworthy of belief.

I set aside the order by which the learned Magistrate confirmed his provisional order under section 133 of the Code of Criminal Procedure and direct that proceedings shall be stayed until the matter of the existence of the public right shall be decided by a competent civil court.

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## FULL BENCH

*Before Sir Shah Muhammad Sulaiman, Chief Justice,  
Mr. Justice Thom and Mr. Justice Iqbal Ahmad*

1935  
*April, 29*

OFFICIAL LIQUIDATORS, DEHRA DUN-MUSSOORIE  
ELECTRIC TRAMWAY CO. (PETITIONERS) *v.* PRESI-  
DENT, COUNCIL OF REGENCY, NABHA STATE  
(OPPOSITE PARTY).\*

*Companies Act (VII of 1913), sections 184, 186, 187—Civil Procedure Code, section 86—Jurisdiction—Putting a Sovereign Prince or Ruling Chief in the list of contributories—Making calls on and ordering payment by a contributory who is a Sovereign Prince or Ruling Chief—Civil Procedure Code, section 141—Proceedings in court in winding up of company.*

Section 86 of the Civil Procedure Code does not apply to proceedings under section 184 of the Companies Act for settling the list of contributories, but it does apply to all proceedings under sections 186 and 187 of the Companies Act for ordering payments to be made by the contributories.

Section 184 of the Companies Act imposes a statutory duty upon the court to settle the list of contributories, and the matter is not optional or discretionary. Accordingly, if a Sovereign Prince or Ruling Chief is a contributory, he must be placed in the list of contributories; and for this purpose no previous consent of the Governor-General in Council is required under section 86 of the Civil Procedure Code, for it can not be said that when such a list of contributories is to be settled the court is starting any proceeding analogous to that of a suit brought by a private person against a Sovereign Prince or Ruling Chief.

On the other hand, the court's action under section 186 or 187 of the Companies Act is discretionary, and an order will be made under those sections if the case is a fit case. An order for payment by a contributory can be made under those sections only in cases where a suit to recover the amount would be maintainable, and no such order will be made under those sections if by such procedure the opposite party would be deprived of some defence or answer which would be open to him in a suit for the money. Section 86 of the Civil Procedure Code confers a special privilege on Sovereign Princes and

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\*Miscellaneous Case No. 96 of 1926.

Ruling Chiefs which entitles them to defend a suit on the mere ground that the previous consent of the Governor-General in Council has not been obtained. The court, therefore, under sections 186 and 187 of the Companies Act can not have jurisdiction to override the provisions of section 86 of the Civil Procedure Code and make an order for payment against a Sovereign Prince or Ruling Chief in the absence of the previous consent of the Governor-General in Council. No jurisdiction exists in a British Indian court to enforce any personal liability against a Sovereign Prince or Ruling Chief, unless the case can be brought within the scope of section 86 of the Civil Procedure Code; and inasmuch as in the present case none of the conditions mentioned in clauses (a), (b) and (c) of sub-section (2) of section 86 existed, no consent of the Governor-General in Council could be obtained, and therefore no order under section 186 or 187 of the Companies Act could be passed at all.

Proceedings under section 186 or 187 of the Companies Act are proceedings in a court of civil jurisdiction to which section 141 of the Civil Procedure Code is applicable, and therefore section 86 is also applicable.

Dr. N. P. *Asthana* and Mr. *Bhagwati Shankar*, for the applicants.

Messrs. *B. E. O'Connor* and *Ram Nama Prasad*, for the opposite party.

SULAIMAN, C.J.:—The question referred to the Full Bench is: "Does section 86 of the Code of Civil Procedure apply to proceedings under sections 184 and 186 and 187 of the Indian Companies Act?"

The Dehra Dun-Mussoorie Electric Tramway Co., Ltd., has been in liquidation and has been wound up. The former Maharaja of Nabha had purchased a large number of shares and paid in a large sum of money in cash, but a sum of about Rs.20,000 was outstanding as the unpaid balance on account of those shares. After some correspondence, the then Managing Agent accepted a Rolls Royce car as payment on account of the outstanding balance. The car was shown as part of the properties of the company and the shares were shown as having been paid up. There was, however,

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some dispute on account of the transfer of that car by the Managing Agent and an interpleader suit was filed in the Calcutta High Court in respect of that car. It was on account of the pendency of that interpleader suit that the Company Judge ordered that the question of the liability of the Maharaja of Nabha should be postponed till after the decision of the suit. The Rolls Royce car was sold at a low price and the sale proceeds have already been credited in the account to the Nabha Darbar and the claim is for the balance only. On the question having been raised, and no settlement having been arrived at by an amicable arrangement, the liquidator filed the application, out of which this reference has arisen, on the 1st of September, 1933, in which he prayed (a) that the matter (the settlement of the list of contributories) be heard and decided at an early date, and (b) the Nabha Darbar be called upon to pay the Official Liquidator the sum of Rs.19,240-15-3 together with interest. The matter came up before a Bench of this Court and objection was raised on behalf of the Nabha Darbar that without the previous consent of the Governor-General in Council as required by section 86 of the Code of Civil Procedure no proceedings could be taken against the Darbar.

So far as the question of the settlement of the list of contributories is concerned, the matter appears to be simple. Section 184 of the Indian Companies Act provides that as soon as may be after making a winding up order the court *shall* settle a list of contributories, etc. The section is, therefore, imperative and imposes a duty upon the court to settle the list of contributories. It is not necessary that any application should be made by the liquidator to the court for settling such a list. The rules, which were made by this Court by virtue of the power vested in it under the Act and which are admittedly applicable to the present case, were the old rules 54 and 55 under which the Official Liquidator had to file a list in court and obtain an appointment

for the court to settle the same and it was the Official Liquidator who was to give notice of such appointment to the persons included in the list. There was to be no application made to the court and the court did not issue any notice direct to the opposite party to show cause. But a date was fixed on which it was open to the contributories mentioned in the list prepared by the Official Liquidator to appear and take any objection. There being a statutory duty on the court to settle the list, it follows necessarily that there is no option but to settle such a list. It cannot be said that when such a list is to be settled the court is starting any proceeding analogous to that of a suit brought by a private person against a Sovereign Prince or a Ruling Chief, for which the previous consent of the Governor-General in Council is required under section 86 of the Code of Civil Procedure. It is, therefore, impossible to accept the contention that before even the list is settled, the consent of the Governor-General in Council should be obtained.

The proceeding under section 186, however, stands on a different footing. Under that section "The court may, at any time after making a winding up order, make an order on any contributory for the time being settled on the list of contributories to pay . . . any money due from him . . . to the company exclusive of any money payable by him . . . by virtue of any call." Now the section is discretionary and the court is not bound to make an order but may make such an order in a fit case. It is also necessary that when the order is passed, there should be money due from a contributory exclusive of any money payable by him by virtue of a call. The interpretation of section 186 of this Act has been set at rest by the recent pronouncement of their Lordships of the Privy Council in the case of *Hansraj Gupta v. Official Liquidators of Dehra Dun, etc. Company* (1). At page 1078 their Lordships laid down that

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(1) (1932) I.L.R., 54 All., 1067.

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the meaning and effect of section 186 was identical with the corresponding section in England. The three features of the section were emphasised: "(1) It is concerned only with moneys due from a *contributory*, other than money payable by virtue of a call in pursuance of the Act. A debtor who is not a contributory is untouched by it. Moneys due from him are recoverable only by suit in the company's name. (2) It is a section which creates a special procedure for obtaining payment of moneys; it is not a section which purports to create a foundation upon which to base a claim for payment. It creates no new rights. (3) The power of the court to order payment is discretionary. It may refuse to act under the section, leaving the liquidator to sue in the name of the company, and it will readily take that course in any case in which it is made apparent that the respondent under this procedure, if continued, would be deprived of some defence or answer open to him in a suit for the same moneys." At page 1079 their Lordships again emphasised that the provisions must be confined to "money due and recoverable in a suit by the company, and they do not include any moneys which at the date of the application under the section could not have been so recovered."

This case was, of course, followed by the later Full Bench case of this Court in *Shiam Lal Diwan v. Official Liquidator, U. P. Oil Mills Co.* (1), in which one of the members of the Bench at page 936 also emphasised that the analogous section 235 also did not create new rights and the procedure under the section would not be adopted where it would deprive the opposite party of some defence or answer open to him in a regular suit.

It follows, therefore, that where there was any case of an order to be made under section 186 for payment of money due from a person, the order can be made by the court only in cases where a suit to recover the

(1) (1933) I.L.R., 55 All., 912.

amount would be maintainable. If the remedy by suit is for some reason or other barred, then the court would not make an order under section 186, for it would be depriving the opposite party of the defence which is open to him.

Now section 86 of the Code of Civil Procedure confers a special privilege on Sovereign Princes and Ruling Chiefs which presumably existed under treaties before even the earlier Code was enacted, and entitled them to defend a suit on the mere ground that the previous consent of the Governor-General in Council has not been obtained. It seems to me that it could not have been the intention of the legislature that the proceedings under section 186 should deprive them of this defence. Indeed, it follows from the observations of their Lordships of the Privy Council that no new rights and no new liabilities are created by section 186, but that it only provides a speedy procedure for recovering the amount due, that the Princes cannot be made liable when a suit against them would not be maintainable. The court under section 186 merely enforces an existing liability which can be enforced without any obstacle or impediment, and cannot, therefore, override the provisions of section 86 of the Code of Civil Procedure by making an order under section 186 of the Companies Act.

But in the present case the liability of the Nabha Darbar is said to be on account of the unpaid call money with which section 186 of the Companies Act does not deal. It expressly refers to moneys due exclusive of any payable by virtue of any call. Section 156 of the Companies Act fixes the statutory liability of the present and past members of a company and lays down the extent to which each is liable. Their Lordships in *Hansraj Gupta's* case (1) made it clear at pages 1078 and 1079 that section 186 would not be applicable to cases relating to money due on shares in the company

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which was in liquidation, the liability for which on a winding up became a statutory liability under section 156 of the Companies Act. It is, therefore, open to the company Judge to declare in an *ex parte* proceeding that a Sovereign Prince or a Ruling Chief has the statutory liability to pay a certain amount, but such a declaration is of no avail unless the order is made under section 187 making calls on and ordering payment thereof by such a contributory. The question that falls for consideration is whether the order under section 187 can be made against a Sovereign Prince or a Ruling Chief without the consent of the Governor-General in Council.

Now in the first place, the consent of the Governor-General for making calls and ordering payment thereof is not of any use unless the case is one of the three classes mentioned in sub-section (2) of section 86 of the Code of Civil Procedure. *Prima facie* the order making calls does not fall in either of the three categories. It follows, therefore, that either no order can be made at all under section 187 or it can be made without such consent.

Section 141 of the Code of Civil Procedure lays down that the procedure provided in this Code in regard to suits *shall* be followed, as far as it *can* be made applicable, in all proceedings in any court of civil jurisdiction. The Code, of course, contains section 86 also. It has been held by their Lordships of the Privy Council that this section applies to all original matters that are initiated in a court of civil jurisdiction, although they are not really suits. The point for consideration then is whether proceedings under section 187 in which the court can make call on and order payment thereof by a contributory can be regarded as proceedings in a court of civil jurisdiction to which section 141 and therefore section 86 is also applicable.

It is true that unlike section 186, there is no provision in the Companies Act for a separate suit being filed

in respect of these calls and the only court which can make the order under section 187 is the winding up court. But it does not follow that the court can bring under its jurisdiction persons who are declared to be outside the jurisdiction of British courts, subject to certain reservations. The order making calls or ordering payment thereof is of a necessity an enforcement of the personal liability of the contributory on account of the outstanding balance due from him. No order can be passed unless the court has jurisdiction to enforce the personal liability of the Sovereign Prince or the Ruling Chief. It seems to me that no such jurisdiction exists in a British court, unless the case can be brought within the scope of section 86 of the Code of Civil Procedure.

Before the matter came into the court, the company had no remedy against the Prince or the Chief in respect of the money due from him, excepting, of course, the forfeiture of shares or withholding payment of money due to him. Section 187 in my opinion does not confer any higher jurisdiction on the court to enforce the remedy which was not open to the company before the liquidation proceedings, against a person who is not amenable to the court's jurisdiction. I am, therefore, of the opinion that no order under section 187 can be made against the Sovereign Prince or the Ruling Chief at all, and no question of any consent of the Governor-General in Council can arise, because such a case does not fall in any of the three classes mentioned in sub-section (2) of that section. Apparently the legislature has intended that Sovereign Princes and Ruling Chiefs are altogether exempt from all personal liability and cannot be sued against in a British court except in respect of matters within fixed limits, and there, too, after the previous consent of the Governor-General in Council has been obtained. Persons or companies dealing with Sovereign Princes and Ruling Chiefs enter into transactions with open eyes and have

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no grounds for complaint if it turns out later on that they have no remedy to enforce their personal liability. It is for companies to make sure that they do not sell shares to such persons unless they are fully paid up. The position of the companies is, to my mind, exactly the same as that of other sellers of articles, who have no remedy left in case the balance of the price is not paid.

I would, therefore, answer the question referred to this Bench by saying that section 86 of the Code of Civil Procedure does not apply to the proceedings under section 184, but that it does apply to all the proceedings under sections 186 and 187 of the Companies Act.

THOM, J.:—I concur. So far as section 184 is concerned it charges the court with a statutory duty in the winding up proceedings of companies. In exercising its powers under section 184 the court does not exercise any jurisdiction over a Native Prince or over an Independent State. If the court makes an order under section 184 and places the name of a Native Prince or a Regent of an Independent State upon the list of contributories, it does not thereby enforce a jurisdiction against that Native Prince or against the Regent or President of the Independent State. So far as sections 186 and 187 are concerned, however, different considerations arise. There is no doubt that the present application under sections 186 and 187 is a proceeding in a civil court within the meaning of section 141 of the Code of Civil Procedure. Section 86 therefore is applicable. Section 86 states in clear and specific terms that Independent States and Native Princes are not liable to the jurisdiction of the British courts in India. They may be sued, however, in certain instances if permission of the Governor-General in Council is granted.

It has been contended, however, that sections 186 and 187 of the Companies Act impose certain liabilities



upon Independent States and Native Princes as shareholders in companies which have gone into liquidation. That may be so, but I am clearly of the opinion that it never was the intention of the legislature by these sections to extend the jurisdiction of the British courts in India. If the contention of the Official Liquidator that under sections 186 and 187 the court may issue an order calling upon Independent States to pay a certain sum of money as contributories be accepted, then a very wide and sweeping alteration in the existing law would be implied. Under the existing law Independent States and Native Princes are not subject to the jurisdiction of the courts in India. This is enacted in specific terms by section 86 of the Code of Civil Procedure, and in my judgment an alteration of the law of jurisdiction which is embodied in specific statutory enactment may not be effected by implication in a statute which has nothing whatever to do with jurisdiction. In these circumstances I am of opinion that it is not open to the Official Liquidator to present an application asking the court to issue an order against the Nabha State under sections 186 and 187 of the Indian Companies Act. In the result I agree that the questions submitted to this Bench should be answered as the learned CHIEF JUSTICE suggests.

IQBAL AHMAD, J.:—I agree with the judgment that has been delivered by the CHIEF JUSTICE and have nothing to add.

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## REVISIONAL CIVIL

*Before Mr. Justice Allsop and Mr. Justice Ganga Nath*

1935  
December, 5

GURCHARAN PRASAD (APPLICANT) *v.* SECRETARY OF  
STATE FOR INDIA (OPPOSITE-PARTY)\*

*Succession Certificate—Court Fees—Rates enhanced by Amending Act after application for succession certificate—Court fee payable according to provisions in force at the date of issue of the certificate—Court Fees Act (VII of 1870), section 6—Succession Act (XXXIX of 1925), section 379.*

Under section 6 of the Court Fees Act the court fee prescribed for a succession certificate is payable on the certificate itself and not in respect of the application for the issue of a certificate. The succession certificate is to be stamped with the proper court fee at the time when it comes into existence as a succession certificate, that is at the time when it is executed by the court, and the amount of fee payable must be calculated according to the Act in force on that date.

No doubt, under section 379 of the Succession Act a deposit has to be made, along with the application for a succession certificate, of a sum equal to the court fee payable on the certificate and the court examines whether the deposit is sufficient according to the Act then in force, but that is only for the purpose of deciding whether it should proceed to consider the application or should refuse to consider it. But the relevant date for the calculation of the correct amount of court fee to be affixed is not the date when the application is made; it is certainly either the date when the certificate is drawn up or perhaps the date when the court passes an order that such certificate should be drawn up.

Messrs. *K. N. Gupta* and *J. R. Bhatt*, for the applicants.

*Mr. Muhammad Ismail* (Government Advocate), for the opposite party.

ALLSOP, J.:—This is an application in which Babu Gur Charan Prasad and another seek a relief in the following terms, namely “That this Hon’ble Court may be pleased to set aside the order of the court below

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\*Civil Revision No. 388 of 1934.

and to grant the succession certificate to the applicants without any further payment of any additional court fee or grant such other and further relief as it may deem fit." The order of the lower court to which reference is made is an order passed by the District Judge of Benares on the 14th of April, 1934. It appears that the applicants on the 15th of December, 1931, made an application for the issue of a succession certificate to them. They made a deposit of Rs.5,541-8-0, estimating that that was the amount of court fee which would have to be paid on the certificate if it was issued to them. It is not denied that this was the correct amount according to the application and to the law which was in force at that time. The proceedings were stayed for some time and then on the 25th of February, 1933, the court made an order that the certificate be granted. By that date the Court Fees Act prevailing in this province had been amended and the office reported on the 6th of March, 1933, that the sum paid in as the court fee due on the certificate would be insufficient by a sum of Rs.4,191. On the same date an objection made by the applicants to this report was considered and the court passed an order saying that the objection was valid and that the court fees were sufficient. It appears that the stamps were then purchased and the certificate was issued to the applicants. About a year later, on the 16th of March, 1934, the Chief Inspector of Stamps inspected the office of the District Judge and made a report to him that the view previously taken was incorrect and that the certificate was insufficiently stamped. The learned Judge considered the matter and eventually on the 14th of April, 1934, passed an order that the deficiency should be made good. The money, that is a sum of Rs.4,191, was paid in but the applicants asked that the sum should not be expended on the purchase of a stamp as they were depositing the amount under protest and proposed to

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obtain an order from this Court. Proceedings were stayed for some time but eventually the certificate which by that time was filed in some proceedings in this Court was summoned by the court below from this Court and a stamp was purchased and that stamp was affixed to the certificate. The result is that the certificate now bears the stamp which should have been affixed to it under the provisions of the amended Court Fees Act, provided that the amount to be paid was to be calculated legally under that Act and not under the Act that was in force when the application for the grant of the certificate was filed in the court of the District Judge. It seems to me that the present application really amounts to this that the applicants desire us to direct the Government to restore to them a sum of Rs.4,191 which has been wrongly expended to the purchase of a stamp now affixed to the succession certificate. It has been argued that the order of the 14th of April, 1934, to which objection has been taken was an order that was made without jurisdiction. In the view that I take of this matter it seems to me that this question of jurisdiction is of no importance at all and is quite irrelevant. The only questions are whether the succession certificate is properly stamped or not and whether if the stamp upon it represents an amount greater than that which was due we can direct the Government to return the money to the applicants. The first important question is whether the document is or is not properly stamped. The reply to this question depends upon the further question whether the court fees which should be paid upon this certificate are those which would be due according to the Act which was in force when the certificate was issued or according to the Act which was in force when the order was passed that a certificate should issue or according to the Act which was in force at the date when the application for the issue of certificate was made. Personally it seems to me

that there is no real difficulty in deciding these questions. Under section 6 of the Court Fees Act it is laid down that "no document of any of the kinds specified as chargeable in the first or second schedule to this Act annexed shall be filed, exhibited, or recorded in any court of justice, or shall be received or furnished by any public officer, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document." The important point to notice is that the fee is payable on the document itself and there is no question of paying court fees on a proceeding or on a suit or anything of that kind. We find in schedule I of the Court Fees Act under No. 12 a certificate under the Succession Certificate Act VII of 1889 and we find that a certain fee is to be paid on such certificate in accordance with the amount or the value of any debt or security specified in the certificate. I cannot see that there is really any difficulty about the matter. It seems to me that the succession certificate was to be stamped with the proper court fee at the time when it came into existence as a succession certificate, that is at the time when it was executed by the court and that the amount of fee payable must be calculated according to the Act which was in force on that date. The applicants have relied upon the provisions of section 379 of the Indian Succession Act. The first sub-section of that section says that every application for a certificate or for the extension of a certificate shall be accompanied by a deposit of a sum equal to the fee payable under the Court Fees Act of 1870 in respect of the certificate or extension applied for. It is argued that the implication is that the amount payable as court fees shall be calculated at the date when the application is made and once a court decides that the amount deposited is sufficient, the matter is settled once for all. It seems to me that this argument is based upon a

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confusion of thought. The court fee is not to be paid on the application for the issue of a certificate but on the certificate itself. If the court fee was to be paid on the application, no doubt it would be calculated at the time when the application was filed, because that would be the document to which reference would be made under section 6 of the Court Fees Act. No doubt a court when it receives an application will go into the question whether the deposit is sufficient or not but it will go into that question for a different purpose, namely for the purpose of deciding whether it should proceed to consider the application or should refuse to consider it. That has nothing to do with the further question after the order for the issue of a certificate has been passed, whether the certificate can be drawn up and furnished to the applicants. It may perhaps be argued that the date when the certificate may be said to come into force is the date when the order is passed that the certificate should issue. I doubt the validity of the argument but I express no definite opinion upon the point. I am quite certain that the relevant date for calculating the amount of court fees is not the date when the application for the issue of the certificate is made. It is certainly either the date when the certificate is drawn up or perhaps the date when the court passes an order that such certificate should be drawn up. In either of those events the amount of court fee due on the certificate was a larger amount, Rs.9,732-8-0. with which the document is now stamped. I may mention that the view I have expressed is supported by the remarks made by the learned Judge who decided the case of *Gangaram Tillockchand v. Chief Controlling Revenue Authority* (1). The applicants have brought to our notice the case of *Thaddeus S. Nahapiet v. Secretary of State* (2). That was a case in which the question of court fees on the issue of

(1) (1927) I.L.R., 52 Bom., 61.

(2) A.I.R., 1924 Cal., 987.

probate was considered. There are certainly some dicta in the judgment which appear to support the applicants but those dicta are based on the special terms of section 19-I of the Court Fees Act and it would be unsafe to rely upon them in deciding this other question which depends upon the interpretation of other sections of the Court Fees Act and of the Succession Act. In that case the court might well have relied on a special provision in the Bengal Court Fees Act of 1922 which raised this scale of fees. The section to which I refer is mentioned in the judgment and it lays down that the higher court fees shall not be payable on probates or letters of administration in which the lower fee had already been paid in, although the actual probate or certificate had not issued. The position then is that I am satisfied that this succession certificate is properly stamped, and, whether the court had jurisdiction or not to call upon the applicants to pay in the amount by which the court fees were deficient, it would be quite improper for this Court in the exercise of its revisional powers to direct a refund which is not properly due. To pass such an order would in any case be of little avail because as soon as the succession certificate is filed in any court, it will be the duty of that court to impound it upon the ground that it is insufficiently stamped and to compel the applicants again to pay in the money which we would have directed the Government to refund. There is no justification for any interference in this matter and I would reject the application.

GANGA NATH, J.:—I agree with the order proposed by my learned brother.

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## APPELLATE CIVIL

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Before Mr. Justice Harries and Mr. Justice Rachhpal Singh

SECRETARY OF STATE FOR INDIA (DEFENDANT) v.

ZAHID HUSAIN (PLAINTIFF)\*

*U. P. Town Improvement (Appeals) Act (III of 1920), section 3(1)(b)—Certificate that the case is a fit one for appeal—Form of certificate—Merely granting leave to appeal not sufficient—Appeal incompetent—Special leave to appeal—Should not be granted where appellant wishes to raise a point of law the opposite of which was urged by him and adopted by the lower court—Practice and pleading.*

Under section 3(1)(b) of the U. P. Town Improvement (Appeals) Act the certificate, which when granted by the President of the Tribunal gives a right of appeal to the High Court, should state that the case is a fit one for appeal. The section therefore requires the President to be satisfied that the case is a fit one for appeal, i.e. that the questions involved are such that it is desirable in the interests of justice that the matter should be considered by a higher court; and it is essential that the certificate should show clearly upon the face of it that the President has considered the application for leave to appeal upon its merits and has come to the conclusion that the case is a fit one for appeal.

An order passed by the President, on the appellant's application for sanction to go up in appeal, in the terms "Sanction to go up in appeal is granted as prayed" was not a sufficient compliance with the terms of section 3(1)(b) and did not give the appellant a right of appeal to the High Court; there was nothing to show that the President applied his mind to a consideration of the grounds and came to a conclusion that the questions involved were such as to make the case a fit one for appeal; on the other hand it appeared from the record that the grounds of appeal were not even fully disclosed before the President.

In a case where a party had urged before the Tribunal to adopt a particular method of valuation to ascertain the market value of the property and the Tribunal had adopted it, and then the party wanted to appeal to the High Court on the ground that the method of valuation adopted by the Tribunal

\*First Appeal No. 314 of 1931, from a decree of Zahur Ahmad, President of the Tribunal, Improvement Trust, Allahabad, dated the 25th of February, 1931.



was wrong, and prayed for special leave to appeal under section 3(1)(b)(ii) of the U. P. Town Improvement (Appeals) Act, it was held that special leave to appeal should never be granted in such circumstances.

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Mr. Muhammad Ismail (Government Advocate), Dr. K. N. Katju, and Mr. Kamta Prasad, for the appellant.

Sir Tej Bahadur Sapru, and Messrs. P. L. Banerji, Mukhtar Ahmad and Mansur Alam, for the respondent.

HARRIES and RACHHPAL SINGH, JJ.:—This is a first appeal by the Secretary of State for India in Council against an award of a Tribunal acting under the U. P. Town Improvement Act (U. P. Act VIII of 1919).

In order to carry out certain improvements in the South Malaka area in the city of Allahabad, a house, No. 14, the property of the respondent was acquired compulsorily for the Allahabad Improvement Trust. The amount awarded by the Land Acquisition Officer for this house and the site upon which it stood was Rs.17,324. The present respondent was dissatisfied with the amount awarded by the Land Acquisition Officer and under the provisions of the U. P. Town Improvement Act he appealed to a Tribunal constituted under that Act. The Tribunal having considered the evidence in the case came to the conclusion that the amount awarded by the Land Acquisition Officer was insufficient and awarded the present respondent a total sum of Rs.25,247 for the house and land in question. The appellant being dissatisfied with this award has preferred an appeal to this Court.

The respondent, however, has taken a preliminary objection to this appeal, which, in our view, must prevail. He contends that this Court cannot hear the appeal by reason of the fact that the appellant has not obtained a certificate from the President of the Tribunal, certifying that this is a fit case for appeal. It will be necessary for us to consider in some detail the provisions relating to appeals in cases of this kind.



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Section 56 of the U. P. Town Improvement Act, 1919, provides that an Improvement Trust may, with previous sanction of the Local Government, acquire land under the provisions of the Land Acquisition Act, 1894, as modified by the provisions of this Act, for carrying out any of the purposes of this Act.

The first stage for the compulsory acquisition of property is the valuation of such property to be acquired by the Land Acquisition Officer and in this case the award of that officer assessed the value of such property, as we have previously stated, at the sum of Rs.17,324. It is provided that where the owner of such property is dissatisfied with the award of the Land Acquisition Officer he may appeal to a Tribunal, see section 57 of the U. P. Town Improvement Act and section 18 of the Land Acquisition Act (Act I of 1894).

It is provided by section 58(d) of the U. P. Town Improvement Act, 1919, that the award of the Tribunal shall be deemed to be the award of the court under the said Land Acquisition Act, 1894, and shall be final.

The U. P. Town Improvement Act, 1919, was modified by the U. P. Town Improvement (Appeals) Act, 1920 (Act III of 1920), and section 3 of this Act gives a party who is dissatisfied with the award of a Tribunal a right in certain circumstances to appeal to the High Court.

A party dissatisfied with the decision of a Tribunal constituted under the former Act may appeal to the High Court provided he has obtained from the President of the Tribunal a certificate that the case is a fit one for appeal, or where the High Court has granted special leave to appeal. It is provided, however, that the High Court shall not grant special leave to appeal unless the President of the Tribunal has refused to grant a certificate that the case is a fit one for appeal. In no case can the High Court give special leave to appeal if the amount in dispute is less than Rs.5,000. See section

3(1) (a) and (b) of the U. P. Town Improvement (Appeals) Act, 1920.

It is further provided by section 3(2) of this Act that an appeal shall only lie to the High Court on one of the following grounds, viz:

(i) The decision being contrary to law or to some usage having the force of law;

(ii) the decision having failed to determine some material issue of law or usage having the force of law;

(iii) a substantial error or defect in the procedure provided by the said Act which may possibly have produced error or defect in the decision of the case upon the merits.

It is contended on behalf of the respondent in this case that the appellant has not obtained a certificate from the President of the Tribunal as required by section 3(1)(b) of the U. P. Town Improvement (Appeals) Act, 1920.

After the Tribunal had made its award the present appellant applied on the 16th of May, 1931, that sanction be granted to go up in appeal to the High Court. This application is described as a "Petition under section 3(1) (b) (i) of Act III of 1920", and that is the section which requires a person desirous of appealing to the High Court against an award of a Tribunal to obtain a certificate that the case is a fit one for appeal from the President of the Tribunal. It is to be noted, however, that the prayer is that sanction be granted to the present appellant by the Tribunal to go up in appeal to the High Court and not that a certificate be granted that the case is a fit one for appeal. In the application no grounds are set out for the application beyond the general ground that the petitioner is greatly aggrieved by the award and is not satisfied with it and that he intends to go up in appeal before the High Court of Judicature at Allahabad.

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At the foot of this application appears a note initialled by the President of the Tribunal, dated the 18th of May, 1931. It would appear that the President of the Tribunal asked the Government Pleader for his grounds for making the application in question and the note sets out the reply of the Government Pleader. It reads as follows: "The Government Pleader stated that section 24 of the Land Acquisition Act read with the amendment of U. P. Town Improvement Act related to the case and that there were many other legal points which he did not want to disclose at that time and which he had noted in his written argument." There is a further note by the President of the Tribunal to this effect: "There was no application for bringing on the record the written argument, nor was it brought on the record and at the time the judgment was written it was destroyed. Therefore all those points should be brought to light now so that the court may have facility in passing orders." These notes as signed by the President of the Tribunal make it clear that the present appellant was not prepared frankly to disclose his grounds of appeal to the Tribunal. Beyond stating that section 24 of the Land Acquisition Act read with the amendment of the U. P. Town Improvement Act related to the case the Government Pleader gave no other ground. He appears to have mentioned that certain points were noted in the written argument but these were never brought on the record and such written argument was not in existence at the time of the application, so the President of the Tribunal had nothing before him to refresh his memory. There appears to us to be a lamentable want of frankness in the Government Pleader's other ground for this appeal, namely that there were many other legal points which he did not want to disclose at that time and which he had noted in his written argument. In our judgment counsel appearing for the Government in cases of this kind should put their

case openly and frankly before a Tribunal when they desire such Tribunal to grant them a certificate that the case is a fit one for appeal. From the note of the President of the Tribunal it is abundantly clear that the present appellant did not want fully to disclose his case to him lest presumably the other side should obtain information as to what his case really was.

On the 22nd of May, 1931, the President of the Tribunal passed the following order upon the present appellant's application, "Sanction to go up in appeal is granted as prayed", and such order is signed by the President.

It has been urged before us by counsel for the present respondent that this is not a certificate which gives the appellant a right to appeal to this Court. All that the certificate states is that sanction to go up in appeal is granted, whereas section 3(1)(b) of the U. P. Town Improvement (Appeals) Act requires a certificate from the President of the Tribunal that a case is a fit one for appeal. "Sanction to go up in appeal" merely means that leave to appeal is granted and such a certificate does not show that the President of the Tribunal thought the case was a fit one for appeal. Indeed, it would be extremely difficult for the President of the Tribunal to form any opinion upon the merits of the proposed appeal for the reason that the Government Pleader did not see fit to disclose to him what his real grounds were. It appears to us that the President of the Tribunal was not in a position to form any real opinion upon the merits of the proposed appeal and consequently all he could do was to sanction an appeal or in other words to give his leave to the appellant to appeal to this Court. There is nothing in the order which suggests to us that the President ever considered whether the questions involved were such that it was desirable in the interests of justice that the matter should be considered by a higher court. It is clear from the

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terms of section 3 of the U. P. Town Improvement (Appeals) Act, 1920, that appeals are not to be encouraged and that unsuccessful parties should only be allowed to appeal where the case is difficult and involves important questions of law and procedure. Before granting a certificate giving leave to appeal the President of the Tribunal must certify that the case is a fit one for appeal and that is very different from the President being required merely to give leave to appeal. We can well imagine cases where a President, though not regarding the case as involving any difficult point requiring the consideration of a higher Tribunal, may grant leave to appeal merely on the ground that he did not wish to prevent the unsuccessful party agitating the matter further in a higher Tribunal. Sanctioning an appeal merely amounts to this that the President sees no reason why the appellant should not go to appeal. That is not sufficient to comply with the terms of section 3(1)(b) of the U. P. Town Improvement (Appeals) Act, 1920, as that sub-section requires the President to be satisfied that it is a fit case for appeal before he grants the application for leave to appeal and when granting the application he must state in the certificate that the case is a fit one for appeal.

It has been contended before us on behalf of the appellant that a certificate such as the one existing in this case is sufficient to comply with the terms of the Act. It has been contended that we should give a liberal meaning to the phrase "Sanction to go up in appeal is granted" and construe it as meaning that the President regarded the case as a fit one for appeal.

When any certificate is granted under section 3(1)(b) of the U. P. Town Improvement (Appeals) Act it is, in our opinion, of the utmost importance that this certificate should show clearly upon the face of it that the President of the Tribunal has considered the application for leave to appeal upon its merits and has come to the

conclusion that the case is a fit one for appeal. There appears to be no authority directly upon this point, but cases have been cited to us where their Lordships of the Privy Council have considered certificates granted by High Courts in India granting leave to appeal to His Majesty in Council. In these cases great stress has been laid upon the exact form of the certificate granted. In *Radhakrishna Ayyar v. Swaminatha Ayyar* (1) their Lordships lay down that when any certificate is granted under order XLV of the Civil Procedure Code it is of the utmost importance that the certificate should show clearly on the face of it upon which ground it is based, or if it is intended to come under section 109(c) that the discretion conferred by section 109(c) was invoked or was exercised. LORD BUCKMASTER who delivered the judgment of the Court observed: "When any certificate is granted under that order (XLV) it is, in their Lordships' opinion, of the utmost importance that the certificate should show clearly upon which ground it is based, and they regret to find that the certificate in this case is at least ambiguous. It runs in these terms: 'It is hereby certified that as regards the value of the subject-matter and the nature of the question involved, the case fulfils the requirements of sections 109 and 110 of the Civil Procedure Code and that the case is a fit one for appeal to His Majesty in Council.' There is no indication in the certificate of what the nature of the question is that it is thought was involved in the hearing of this appeal, nor is there anything to show that the discretion conferred by section 109(c) was invoked or was exercised."

In the present case also there is nothing to show on the face of the certificate, which reads "Sanction to go up in appeal is granted as prayed", that it was ever pointed out to the President of the Tribunal that the law required him to be satisfied that it was a fit case for

(1) (1920) I.L.R., 44 Mad., 293.

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appeal before granting a certificate or that he was so satisfied before he granted the certificate in question. From the record it would appear that the grounds upon which the President should have been asked to find that the case was a fit one for appeal were never disclosed to him and it would appear as if he never applied his mind to the real point which he had to determine.

A similar view was taken by their Lordships of the Privy Council in an earlier case, *Radha Krishn Das v. Rai Krishn Chand* (1). In that case a Bench of this Court passed an order in these terms: "Let a certificate issue that the case is a fit one for appeal to His Majesty in Council." But the certificate granting leave stated: "It is certified that though the valuation of the case is below Rs.10,000, yet as regards the value and nature of the case it fulfils the requirements of section 596 of Act XIV of 1882." Their Lordships held that such a certificate was not a proper foundation for leave to appeal and no proper leave had been given. They pointed out that the certificate of leave to appeal and not the order for such certificate is the document which the Judicial Committee are bound to consider and act upon in considering whether leave to appeal has been properly granted or not; and unless the certificate upon which leave to appeal is based is in such a form as to justify that leave, they ought to hold that the leave has not properly been given. They further held that even assuming that the order for the certificate might be looked at, the Judicial Committee would require to be satisfied that the court had exercised its judicial discretion upon the matter in deciding whether in order to comply with section 595 and section 600 of the Code the case was a fit one for appeal to His Majesty in Council, and in this case they were not satisfied (there being no reasons given and no grounds stated in the form of the certificate) that the judicial mind of the court had ever

(1) (1901) I.L.R., 23 All., 415.

been applied to that question. Similarly in the present case there is nothing to show on the face of this certificate that the President of the Tribunal had exercised his judicial discretion upon the matter in deciding whether the case was a fit one or not for appeal to the High Court. From the form of the certificate he may or may not have thought so, but the law requires that the form of certificate granted should make it clear that his mind had been directed to the question which he had to decide and that he had decided that it was a fit case for appeal.

In our judgment the principles enunciated by their Lordships of the Privy Council in the two cases cited above relating to certificates granted by High Courts in India for leave to appeal to His Majesty in Council apply to the present case. That being so, we are bound to hold that the appellant in this case has not obtained a certificate which entitles him to prefer an appeal and consequently we cannot hear the appeal unless it is a proper case in which special leave to appeal should be granted by this Court.

Application for such special leave to appeal was made to us by the learned Government Advocate on behalf of the appellant, but in our judgment this is a case where no such leave should be granted.

On behalf of the respondent it was contended before us that this Court could not in the circumstances of this case grant special leave because such can only be granted where the President of the Tribunal has refused to grant a certificate that the case is a fit one for appeal. It is said in this case that the President of the Tribunal has not refused to grant such a certificate. He has granted a certificate but not a certificate such as is required by the statute. It is said that the form of the application to him makes it clear that he was never asked to certify that this was a fit and proper case for appeal and therefore it cannot be said that he ever refused to grant such

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a certificate. This point, however, is not of importance in this case, because even assuming that the form of the order passed by the President of the Tribunal amounts to a refusal to grant a certificate that the case is a fit one for appeal we are not satisfied that it is a case where special leave should be granted.

It has been contended before us that the method adopted by the Tribunal in assessing compensation was wrong and that the assessment of the value of the land and of the buildings thereon which was adopted by the court was not a permissible method when determining the value of the property. It has been pointed out to us that what the Tribunal has to determine is the market value of the property and therefore that the method adopted in this case is contrary to law. Section 23(1) of the Land Acquisition Act provides that in determining the amount of compensation to be awarded for land acquired under this Act the court shall take into consideration firstly the market value of the land at the date of the publication of notification under section 4(1) and secondly certain heads of damage sustained by the owner of the property. It is urged in this case that the method adopted has been a valuation of the land and the structures thereon and that such is not a method for ascertaining the market value of the property. The contention urged before us now does raise an important question of law, and that being so, we could, in a proper case, grant special leave to appeal under section 3(1)(b)(ii) of the U. P. Town Improvement (Appeals) Act, 1920. However, the present case does not appear to us to be a case in which we should exercise our discretion in granting such leave to the appellant. From a perusal of the record it is abundantly clear that the Government Pleader on behalf of the present appellant never contended before the Tribunal that the method of valuation adopted by the Tribunal was in any way improper or incorrect. On the contrary, from the very commence-

ment the valuation of the property in this case has proceeded upon the basis of a valuation of the land, plus a valuation of the buildings erected upon it.

As we have stated previously these proceedings commenced by an award of the Land Acquisition Officer who acts for and on behalf of the Collector of the district. The award of the Land Acquisition Officer is binding upon the Government and if it is accepted by the owner of the property the matter is at once concluded. That officer is an officer of the Government and it is to be observed that he valued the property in question by first valuing the land and then the buildings erected upon it. He valued the land at the sum of Rs.1,224 and the buildings erected upon it at Rs.16,100 including compulsory allowance making a total valuation of Rs.17,324. It was against this award that the present respondent appealed to the Tribunal and very naturally the Tribunal proceeded to consider the merits of the case upon the basis of the valuation of the Land Acquisition Officer. The present respondent called evidence to show that the Land Acquisition Officer had undervalued the land and the buildings and the present appellant tendered in evidence the valuation of the Land Acquisition Officer and this indeed was the only evidence tendered by him. In short, the present appellant put forward the valuation of the Land Acquisition Officer as a fair valuation of this property for the purposes of the compulsory acquisition. By tendering and relying upon such evidence he impliedly contended before the Tribunal that the method adopted by the Land Acquisition Officer was the fair and proper method of assessing the value of this land in accordance with the Land Acquisition Act and the U. P. Town Improvement Act. The appellant now contends that the method of assessing the compensation adopted by the Tribunal was contrary to law, yet it is clear from the record that he actually invited the Tribunal to assess the compensation in that

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manner. That being so we are wholly unable to hold that this is a case where we should exercise our discretion and grant special leave to appeal.

It is true that the Land Acquisition Act requires the Tribunal to assess the market value of the property, but this of course may be done in many ways. Where a party invites the Tribunal to adopt a certain method of valuation to ascertain the market value of the property, such a party cannot at a later stage ask this Court for special leave to appeal upon the ground that the Tribunal has acted in accordance with his own method of valuation. In short, the appellant now asks this Court to grant special leave upon the ground that a wrong method of valuation has been adopted by him throughout the proceedings, which method of valuation the Tribunal adopted at his invitation. In our judgment special leave to appeal should never be granted in circumstances such as exist in this case.

A very similar view was taken by another Bench of this Court in an application for special leave to appeal in the case of the *Secretary of State for India v. Lala Misri Lal*, decided on 10th December, 1931. In that case the President of the Tribunal had refused to grant a certificate and a Bench of this Court refused to grant special leave because the legal point raised as to the method of valuation adopted had never been raised in the proceedings before the Tribunal.

We consequently refuse to grant the appellant special leave to appeal and the appeal must therefore be dismissed as incompetent. The respondent must have the costs of the appeal.

It was further contended before us by counsel for the respondent that there was no proper memorandum of appeal in this case by reason of the fact that it was filed without the authority of the Secretary of State for India in Council. The contention is that the appeal was filed upon the instructions of the Collector of Allahabad and

that according to the rules framed by the Government a Collector has no authority to instruct anyone to file an appeal. It was conceded in argument by the learned Government Advocate that in this case the Collector had no express authority but he urged that an authority to perform such an act could be implied. He further contended that even if the appeal was filed without the authority of the Secretary of State we should in the particular circumstances of the case extend the time for appealing and thus make the appeal competent. These contentions involve points of considerable difficulty and importance but we do not consider it necessary or desirable to decide them in this judgment. We have decided that the present appeal is incompetent by reason of non-compliance with section 3 of the U. P. Town Improvement (Appeals) Act and such concludes the matter. The point as to the authority of the Collector to institute proceedings by way of appeal does not arise in this case and any observations on the point would therefore be merely *obiter* and not binding upon any other court. That being so, we leave the point open and express no opinion upon it in this judgment.

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*Before Sir Shah Muhammad Sulaiman, Chief Justice,  
 and Mr. Justice Bennet*

BOMBAY BARODA AND CENTRAL INDIA RAILWAY  
 (DEFENDANT) v. DWARKA NATH (PLAINTIFF)\*

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*Railways—Negligence—Allowing grass to grow high on railway land close to the rails—Grass set on fire from running engine, and fire catching on to tall grass on plaintiff's neighbouring land and his haystacks and trees—Contributory negligence—Negligence apart from breach of any statutory duty—Railways Act (IX of 1890), section 13.*

On the track of a railway dry grass, two feet high, was standing on the land between the rails and the fencing; across the fencing was the plaintiff's land, on which tall grass, six feet high, was standing close up to the fencing; part of the grass

\*Appeal No. 33 of 1935, under section 10 of the Letters Patent..

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on that part of his land which was distant from the fencing had been cut down and stacked. The grass on the railway land caught fire, either due to sparks from a running engine or to live cinders falling from the ash-pan of the engine, and the fire spread on to the plaintiff's land, burning down the standing grass, the stacks and some trees. The plaintiff sued the railway for damages. It was not alleged or proved that the construction or the working of the engine was in any way defective or improper.

*Held*, that if allowing the easily combustible grass to remain on the railway land in the close vicinity of the rails, exposed to the risk of catching fire from sparks or live cinders from engines, was negligence on the part of the railway, the plaintiff was guilty of contributory negligence in not taking sufficient precaution by way of making and maintaining a fire line for the protection of his property or even by way of cutting and removing that part of his grass which was in the vicinity of the fencing, though he was fully cognisant of the risk of the railway grass catching fire from sparks or live cinders and then spreading it on to his own grass next to the fencing; the plaintiff, therefore, could not recover damages from the railway.

On the question whether there was actionable negligence on the part of the railway, *held*—

[*Per* BENNET, J.—Section 13 of the Railways Act, which provides for the imposition of certain duties and precautions on railways, makes no mention of any duty to cut the grass on the banks of the railway lines. There being no statutory duty on the railway to cut the grass, the non-cutting thereof is not an actionable negligence.]

[*Per* SULAIMAN, C.J.:—The enumeration of the precautions mentioned in section 13 is not in any way exhaustive. Though there is obviously no statutory duty on a railway to cut all grass from the railway track, yet this may be a reasonable precaution which the railway should take; and failure to take due care and caution to prevent injury would amount to actionable negligence. Each case must depend on its own circumstances, and it is for the court to decide whether dry grass has been allowed to remain on the railway track so close to the rails and so high in stature as to amount to negligence which makes the railway liable.]

Dr. K. N. Katju and Mr. R N. Gurtu, for the appellant.

Mr. S. B. Johari, for the respondent.

BENNET, J.:—This is a Letters Patent appeal brought by the defendant, the B. B. and C. I. Railway Co., against the judgment of a learned single Judge of this Court dismissing its appeal. The two lower courts have granted a decree against the defendant awarding the plaintiff Rs.600 damages under the following circumstances.

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The plaintiff brought a suit alleging that his land, consisting of waste and jungle lands with patel grass growing on it and timber and fruit trees, adjoins the railway and that in the month of April, 1930, the patel grass had been partly cut and stored in heaps and part was standing, that on the 13th of April, 1930, the passenger train of the defendant company passed along the line and sparks of fire escaped from the engine and dropped on to the railway patri just close to the rails. Paragraphs 5 and 6 of the plaint are as follows:

“That the patri was not clear but covered with grass which had not been removed, owing to the utter negligence and carelessness of the servants of the defendant and therefore the grass on the patri immediately caught fire, and from there the fire at once spread over the plaintiff's jungle lands, burning the standing patel and its heaps, along with some 16 nim and shisham trees worth Rs.700 all belonging to the plaintiff.”

“That it was the duty of the defendant company to keep the patri quite clear and free from any grass and other combustible substance and to take full precautions to prevent the setting up of fire to the adjoining jungle lands of the plaintiff which it failed to do.”

These were the only paragraphs in the plaint alleging negligence and it is to be noted that the only negligence alleged was the negligence of the railway company in not keeping the patri quite clear and free from grass, etc. The defence of the railway company was to put the plaintiff to proof of the fact that the fire had been caused as he alleged and further the railway company

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pleaded in paragraphs 13 and 14 of the additional pleas as follows: "That the defendant company will rely on the principle '*lex non cogit ad impossibile*' (the law does not compel a man to do that which he cannot possibly perform) as affording a complete answer to the plaintiff's claim." "The defendant company maintains that the fire if any was due to the negligence of the plaintiff in keeping the grass in the state alleged in paragraph 3 of the plaint near the railway track, whereon, to the knowledge of the plaintiff, locomotive steam engines of the defendant railway company were authorised by statute to pass and repass day and night."

This pleading was further amplified by a statement of the advocate for defence on the 8th of June, 1931, part of which was as follows: "The plaintiff should himself take care of the grass on his land. If he did not take care there was contributory negligence on his part."

The only issue framed on negligence was issue No. 5: "Whether there was any negligence on the part of the defendant in not removing the grass, if any, and in not keeping the land between the fire lines clear?" The finding of fact as to the cause of the fire in the trial court was: "I hold that there was grass on the railway banks which caught fire owing to live cinders falling down from the railway engine, which fire spread on to the plaintiff's land and burnt the Patel and the trees." The court also stated that on the plaintiff's evidence the fire originated in live sparks escaping from the engine and in live cinders falling down from the ash-pan of the engine. The court inspected the engine but did not find that there was anything defective in the type or working of the engine and no such defect was alleged. The trial court found that there were 12 stacks of Patel grass burnt, valued at Rs.420, and standing Patel grass burnt which was valued at Rs.100 and certain trees burnt valued at Rs.80 and therefore the total amount of compensation awarded was Rs.600. The trial court also

found: "It is the duty of the defendant to keep the fire line clear of grass, etc. especially during the hot season when the grass becomes dried up." It also found that no case of contributory negligence was proved against the plaintiff on issue No. 9 as it held that there was no evidence to show that the arrangement made by the plaintiff for disposing of the patel was such as to amount to negligence on his part. The defendant company appealed and the lower appellate court came to practically the same findings as follows: "I therefore accepting the plaintiff's evidence hold that there was grass on the defendant's land, between the fencing on either side of the railway line, 1 to  $1\frac{1}{2}$  cubit high; that that grass caught fire owing to sparks falling down from the railway engine, and that fire spread on to the plaintiff's land and burnt his patel and trees." Further it was found: "It was the duty of the railway company to keep the fire lines clear of grass especially during the hot season when the grass becomes dried up;" and that "it might be inferred" from the statement of a railway official that "from 1927 the plaintiff was claiming compensation for damages caused to his jungle by the sparks of the defendant company's engines. The railway company should have taken reasonable care and caution but it did nothing of the sort, rather it allowed the grass to remain on the banks of the railway line. Under the circumstances it can be reasonably inferred that there was negligence on the part of the defendants." On the question of contributory negligence the court found as regards the plaintiff's grass: "The heaps of patel were lying at a sufficient distance from the railway fencing. No doubt the standing patel extended up to the railway fencing, but it cannot be said that there was any contributory negligence on the part of the plaintiff." Now as regards the reference in this finding to fire lines this appears to be based on some instructions given by the railway company that fire lines should be cut in the grass on

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the patris. The lower appellate court is not quite clear whether it considered that the duty of the railway company was to keep these fire lines cut or to cut the whole of the patris. The learned single Judge of this Court refers to a few rulings on the subject and considers that the railway company had the duty alleged and were guilty of an actionable negligence. The only point of contributory negligence argued before the learned single Judge was that the servants of the plaintiff did not take steps to put out the fire when they saw it begin. The grounds of contributory negligence which had been argued before the lower appellate court do not appear to have been argued before him, that is, in regard to the arrangement of the plaintiff for the cutting of the grass. Now when the case came in Letters Patent appeal the first ground taken was that the suit as brought was not maintainable and that the railway company was not legally liable for the damage because there was no actionable negligence on the part of the railway company, and that the mere existence of growing grass about a foot and a half high within the railway fencing was legally no evidence of negligence at all. Further, it was argued in ground No. 5 that by allowing the grass on his own land to grow high right up to the railway fencing the plaintiff had been guilty of negligence and was not entitled to the relief claimed. There are therefore two points of law in this appeal; firstly whether there was a duty of the railway company to cut the grass within their fencing, and secondly whether the plaintiff was guilty of contributory negligence. Now the railways in this country are run under the authority of Act IX of 1890, the Railways Act. That Act provides certain precautions in different sections, and particularly in section 13 it is laid down that the Governor-General in Council may require that within a time to be specified in the requisition or within such further time as he may appoint in this behalf certain precautions shall be taken

by a railway company. These precautions include the fencing and a screen adjoining the side of public roads to prevent horses and other animals being frightened, and suitable gates, chains, bars, stiles or hand rails to be erected or renewed at crossings and persons to be employed by the railway administration to open and shut these gates, chains or bars. Now if the legislature had intended that a railway company should have the duty of cutting the grass within its fencing it appears that section 13 would have made a provision for the Governor-General in Council to issue orders on the subject. The length of the line of a company like the defendant company is often very considerable and extending to thousands of miles. The cutting of grass within that area, if it is a duty of a railway company, is a very considerable matter and one which would entail a very large amount of expenditure. It is therefore a matter which would certainly attract the attention of the legislature in passing an Act like the Railways Act, and it is strange that if such a duty were to exist on a railway company in India there would be no provision in the Railways Act of 1890 for the framing of rules on the subject. It is true that in the present case it is shown that the railway company itself issues some instructions in regard to the cutting of grass, but the fact that the company does issue instructions on this subject does not show that there is a legal obligation on the company to cut the grass during the whole length or any part of the length of its railway system.

The rulings on the subject which have been brought forward are as follows. In *Halford v. East Indian Railway Company* (1) there was a case before a learned single Judge in Calcutta which was taken in appeal before a Bench of the Calcutta High Court. In that case the plaintiff claimed damages on the ground that the company had allowed grass of too great a length to remain on the railway banks and had driven an engine along

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(1) (1874) 14 Beng. L.R., 1.

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the line without due precautions being taken to prevent the expulsion of sparks. It was held that the defendant company was authorised to run locomotive engines on the line of the railway constructed by the company under the statutory powers given to it, and therefore the company was not liable for damage caused in making the line under such statutory powers without proof of negligence. It was held also on the evidence that neither in the construction of their engines nor in the condition of the railway banks was any negligence shown on the part of the company. The plaintiff's land was separated from the railway by a fence and there was a stable and some other constructions and a bungalow, and two heaps of thatching grass were lying on the plaintiff's land. The eastern bank of the railway and the cutting was covered with growing grass. On page 7 reference was made to evidence to the effect that the grass was only 6 to 8 inches long and on the other hand the evidence of the plaintiff was that it was 6 feet in length and had been cut and two feet of the grass was left standing after cutting. The court found that the grass was about a foot high and that the existence of grass of that height would not be evidence of negligence against the railway company. The company had left trimmings of cut grass along the place where the grass was cut. The Bench on appeal upheld the finding of the learned single Judge that the existence of grass in that condition did not amount to negligence. Now it is to be noted that in the present case the railway company had not cut the grass. In the Calcutta case there was a case of alleged misfeasance, that is that the railway company had cut the grass in a manner which was negligent by allowing too much grass to remain after cutting and by allowing certain grass which had been cut to remain lying on the spot. In the present case the plaintiff has a weaker case as he has alleged non-feasance on the part of the railway company and he

has to show that the railway company had a positive duty to cut the grass between the fencing.

The only case of this High Court to which reference has been made is a case of civil revision, *Secretary of State for India v. Dwarka Prasad* (1). In that case there was no question of grass but the trial court had held that there was negligence on the part of the railway company because the drivers of two engines were negligent in racing, and further the court held that it was not established that spark protectors had been used on the engines. On this finding of negligence the decree for damages was upheld. That case however is distinguished from the present case because there has been no allegation in the present case that there was any negligence on the part of the driver or that the engine was in any way defective in construction. Learned counsel attempted to remedy this defect in his plaint by arguing that there might be some such defect in the construction. But in the absence of any such allegation in the plaint and any evidence before the courts below it is much too late to make a new suggestion of this kind in Letters Patent appeal.

In *Smith v. London and South Western Railway* (2) there was a claim against the railway company because the servants of the company had allowed cut dry grass to be on the line of the company on each side of the railway in what was alleged to be a negligent manner and thereby fire was caused which burnt the plaintiff's cottage. This however was a case of allowing cuttings and trimmings of grass to remain after the grass had been cut on the banks of the railway in a season of unusual heat and dryness, and BRAMWELL, C.J., in his judgment held that this might be evidence from which a jury might presume negligence. In the present case the plaintiff does not allege that there was any cut grass lying on the patri which might have caused the fire.

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(1) (1927) I.L.R.. 49 All., 559.

(2) (1870) L.R., 5 C.P., 98.

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but his complaint is that there was standing grass which had not been cut. In England the question of claims against a railway company has been settled to a certain extent by the Railway Fires Act, 1905, and in that Act it is provided that negligence need not be proved against a railway company where damage is done to agricultural lands or agricultural crops by sparks or cinders from the railway engine and where a sum of money not exceeding £100 is claimed, provided due notice is given to the railway company. But in cases where damage exceeding £100 is claimed, there it is necessary for the plaintiff to prove negligence on the part of the company. In India there is no provision of law similar to the Railway Fires Act and therefore it is necessary for the plaintiff in the present case to prove negligence.

In *Canadian Pacific Railway v. Roy* (1) there was a case before their Lordships of the Privy Council from the province of Quebec in Lower Canada where the plaintiff had suffered damage caused by sparks escaping from a locomotive engine. It was held that because the Civil Code of Lower Canada and the Dominion Railway Act did not impose any liability of this nature on a railway company acting within its statutory powers therefore the railway company was not liable for the damage caused by the sparks from their engine. The judgment proceeded on the ground that it was necessary to establish definitely negligence on the part of the railway company. At page 331 the LORD CHANCELLOR stated: "The legislature is supreme, and if it has enacted that a thing is lawful, such a thing cannot be a fault or an actionable wrong. The thing to be done is a privilege as well as a right and duty." The case of Canada is therefore distinct from the case of England because in Canada there is a Dominion Railway Act. In England there is no general Railway Act but the different companies obtain statutory authority provided by Acts of Parliament. In India the case is similar to

(1) [1902] A.C., 220.

the case of Canada because there is a general Act, the Railways Act of 1890. This judgment therefore is some authority for the proposition that in the default of a provision in the Railways Act of 1890 the company cannot be liable for exercising its statutory powers of running railway engines on its lines.

None of the rulings which have been laid before the court show that there is any duty of a railway company either in England or in India to cut the grass on the banks of its railway lines. In the absence of any authority of this nature it is difficult to hold *prima facie* on *a priori* considerations that there is such a duty of the railway company. The courts below and the learned single Judge of this Court have not indicated where the legal duty is imposed on a railway company to cut the grass on its banks. The absence therefore of any authority for such a proposition makes it difficult to accept the findings of the courts below that there was negligence by a breach of the railway company of this assumed duty.

Now the other part of the argument of learned counsel for the appellant based on ground No. 5 is that even if there was negligence on the part of the railway company in committing a breach of the assumed duty, still the plaintiff cannot recover damages because the plaintiff was guilty of contributory negligence. This argument has been based on the admission of the plaintiff that he was aware since the year 1927 that there had been occasionally such fires caused by sparks from the railway engines. In spite of that knowledge the plaintiff allowed his patel grass, which is grass of a considerable height, about 6 or 8 feet, to grow up to the railway fencing. It would have been open to the plaintiff to keep a certain area about 10 feet wide free from grass, and such an area parallel to the railway fencing would have acted as a fire line, and if a fire had started on the grass inside the railway fencing such a fire could not have spread to the patel crop of the plaintiff. There

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was further negligence of the plaintiff in the method which he adopted in cutting his field. He cut the field in the part remote from the railway and stacked 12 stacks of grass amounting in value to Rs.420. At the same time he left the patel crop standing adjacent to the railway line. There was therefore a means of communication of the fire between the railway line and his stacks of patel grass which are found by the courts to have been 50 or 100 yards from the railway fencing. It is obvious that if the plaintiff had adopted the sensible method of cutting his patel grass adjacent to the railway line first then it would not have been possible for the fire to spread to his stacks of patel grass. Learned counsel for the respondent has not been able to explain why the plaintiff did not adopt this simple precaution. This does appear to amount to contributory negligence on the part of the plaintiff and accordingly this furnishes another reason why the decrees of the courts below should be reversed. The courts below do not appear to have approached the subject from this point of view. Where a man is well aware that a danger may result from the use of railway engines in a statutory manner and where that man grows a crop of an inflammable nature close to the railway line it is a matter of ordinary precaution for him to place a fire line between his crop and the railway fencing. Learned counsel addressed some argument to us that the omission to grow patel grass on a fire line 10 feet broad would cause a large amount of loss to the plaintiff. That argument is however shown to be incorrect by a consideration of the value of the crop and the area on which it is grown. Patel is not at all a valuable crop and the omission of a small area would be a matter of no importance from the financial point of view.

For these reasons I consider that this Letters Patent appeal should be allowed and the suit of the plaintiff should be dismissed.



SULAIMAN, C.J.:—I agree that the appeal should be allowed and the plaintiff's suit dismissed. There are two questions which arise in this case. The first is whether the railway company, by not having taken sufficient precautions to prevent damage, has been guilty of such negligence as to make it liable for the loss sustained by the plaintiff. The second is whether even if the company has been guilty of negligence the plaintiff also has not contributed by his own default to the same negligence which resulted in the loss occasioned to his property. The first question is not free from difficulty. The case put forward by the plaintiff simply was that the grass within the railway fencing was set fire to when the defendant's engine passed that way, and it was alleged in the alternative that either the fire originated from live sparks escaping from the engine or from live cinders falling down from the ash-pan of the engine, with the result that the dry grass within the railway fencing caught fire first and then spread to the grass outside the fencing which belonged to the plaintiff and ultimately reached the place where the plaintiff's hay stacks were located. The first court came to the conclusion that when the engine was running at speed it was quite possible that live cinders might drop down from the ash-pan on the railway bank, and it held that there was grass on the railway banks which caught fire owing to live cinders falling down from the railway engine, which fire spread on to the plaintiff's land and burnt the plaintiff's patel and trees. The lower appellate court, while affirming that finding was not so definite. It came to the conclusion that there was grass on the defendant's land between the fencings on the two sides of the railway line about one cubit and a half high, and that the grass caught fire owing to sparks falling down from the railway engine and that the fire spread on to the plaintiff's land and burnt his patel and trees. Both the courts below recorded a finding that the railway company should have taken reasonable care

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and caution, but that it did nothing of the sort and that negligence on the part of the defendant was established in the case. A learned Judge of this Court has accepted this finding. On the question of contributory negligence also the finding was in favour of the plaintiff.

Now the question of the liability of a railway company for taking every reasonable precaution to prevent damage to owners of neighbouring lands has created a conflict of opinion even in England. In *Piggot v. Eastern Counties Railway Co.* (1) it was laid down that the fact of certain premises being fired by sparks emitted from a passing engine was *prima facie* evidence of negligence on the part of the company, rendering it incumbent on them to show that some precautions had been adopted by them, reasonably calculated to prevent such accidents.

In *Smith v. London and South Western Railway* (2) certain workmen employed by the railway company after cutting the grass and trimming the hedges bordering the railway, placed the trimmings in heaps between the hedge and the line, and allowed them to remain there for some days during very hot weather; a fire broke out between the hedge and the rails and burnt some of the heaps of the trimmings and the hedge and spread to a stubble field beyond, and was thence carried by a high wind across the stubble field and over a road and burnt the plaintiff's cottage which was some 200 yards away from the place where the fire broke out. There was no definite evidence that it had been due to any spark from the engine which had passed shortly before the time. The court held that it could be fairly presumed that as engines while passing do emit sparks the fire originated from the engine that had just passed and that there was sufficient evidence for the jury to return the verdict that the defendants were negligent in leaving the dry trimmings and that the trimmings either originated or increased the fire and caused it to

(1) (1846) 3 C.B.R., 229.

(2) (1870) L.R., 6 C.P., 14.

spread to the stubble field, and that if the defendants were negligent they were responsible for the injury that resulted.

In *Rex v. Pease* (1) it was held that if a statute authorised the construction of a railway parallel to an ancient highway and if by the passage of waggons, horses of the plaintiff were startled, there could be no indictment for a nuisance inasmuch as the interference with such rights of the public must be taken to have been contemplated and sanctioned by the legislature.

In *Vaughan v. Taff Vale Railway Company* (2) it was laid down that where a wood belonging to the plaintiff had been set on fire by sparks from a locomotive authorised by statute and it was shown that sufficient precaution had been taken by the company, there was no liability. COCKBURN, C.J., remarked: ". . . when the legislature has sanctioned and authorised the use of a particular thing, and it is used for the purpose for which it was authorised, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence, that if damage results from the use of such thing independently of negligence, the party using it is not responsible." The case, therefore, was an authority for the proposition that unless negligence was established independently, the mere use of an authorised thing would not entitle a plaintiff to claim damages when every precaution had been observed to prevent injury. On the other hand in *Jones v. Festiniog Railway Company* (3), a company had been empowered by Act of Parliament to make and use a railway for the passage of waggons and engines and ran passenger trains drawn by locomotive steam engines and had "taken all reasonable precautions to prevent the emission of sparks". The plaintiff's hay stack was however fired by sparks from one of the engines. BLACKBURN and LUSH, JJ., held that as the

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(1) (1832) 4 B. and Ad., 30

(2) (1860) 5 H. and N., 679.

(3) (1868) L.R., 3 Q.B., 733.

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company had no express powers given them by statute to use locomotive steam engines, they were liable at common law for the damage, "though negligence was negatived". In that case the plaintiff had failed to prove that there was a clear negligence on the part of the company. Nevertheless the Bench held the company liable under the common law. The position was re-examined by the House of Lords in *Hammersmith Railway Company v. Brand* (1), which was however a case of damage caused to the plaintiff's land by the vibration caused by trains passing on the railway track. BRAMWELL, B., expressed the view that the cases of *Rex v. Pease* (2) and *Vaughan v. Taff Vale Railway Company* (3) were wrongly decided. But the opinion of the majority of their Lordships was to the effect that those cases were rightly decided, and it was held that "It was established by those cases that when the legislature has sanctioned the use of a locomotive engine, there is no liability for an injury caused by using it, so long as every precaution is taken consistent with its use."

Later in *Powell v. Fall* (4) the defendant company was possessed of a traction engine which was propelled by steam power. Whilst it was being driven by the defendant's servants along a highway, some sparks escaping from it set fire to a stack of hay of the plaintiffs standing on a neighbouring farm. The engine had been constructed in strict conformity with the Locomotive Acts, and at the time of the accident it was being driven at a proper pace, and the defendant's servants had not been guilty of any negligence whatsoever in its management; nevertheless MELLOR, J., whose judgment was upheld by BRAMWELL, L.J., in appeal, held that the defendant was liable to compensate the plaintiffs for the injury done to the stack, upon the ground that the engine being a dangerous machine, an action was maintainable at common law.

(1) (1869) L.R., 4 H.L., 171.

(3) (1860) 5 H. and N., 679.

(2) (1832) 4 B. and Ad., 30.

(4) (1880) 5 Q.B.D., 597.

The case of the *Canadian Pacific Railway v. Roy* (1) has been distinguished by my learned brother. I may only quote a passage from the judgment of the LORD CHANCELLOR at page 231: "The law of England, equally with the law of the province in question, affirms the maxim '*Sic utere tuo ut alienum non laedas*', but the previous state of the law, whether in Quebec or France or England cannot render inoperative the positive enactment of a statute, and the whole case turns, not upon what was the common law of either country, but what is the true construction of plain words authorising the doing of the very thing complained of." Their Lordships then proceeded to consider the effect of the provisions in the Dominion Railway Act. The question has been however settled in England by the enactment of the Railway Fires Act under which railway companies are now made liable to a limited extent even without any proof of negligence at all.

In India the leading case on this subject is that of *Halford v. East Indian Railway Company* (2). The Bench in affirming the judgment of the learned single Judge made it perfectly clear that there was a certain amount of liability on a railway company not only for keeping a properly constructed engine but also for keeping the railway track in a proper state. At page 17 it was stated: "But the company are bound not only to use due care in the construction and use of their engines, but also to use due care in keeping the line of railway and the land belonging to them on each side of it in a proper state." The authority for this proposition was *Smith's case* (3), where the railway company had been made liable not on account of any defect in the construction of the engine or of not adopting means to prevent the emission of sparks or the falling of live cinders from the ash-pan, but because the servants of the company had allowed dry grass to be on the land of the company on

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(1) [1902] A.C., 220.

(2) (1874) 14 Beng. L.R., 1.

(3) (1870) L.R., 5 C.P., 98.

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each side of the railway in what was alleged to be a negligent manner, and thereby the fire was caused which burnt the plaintiff's cottage. Again at page 18 it was remarked: "Now, in considering whether there was due care in keeping the land of the company on each side of the railway in a proper state, we must keep in mind (as is said by BOVILL, C.J.,) that if the company are using an engine which emits sparks and causes a risk of fire, it is incumbent on them, although they may be entitled to use it, to keep the line of railway in a proper state with reference to such danger." The evidence in the case was then examined and the case was decided on the finding that the evidence was not sufficient to show that the grass was left in the state as described by the plaintiff's witnesses or in a state other than what a witness for the defendant had said might fairly and reasonably be left. The Bench therefore after considering the whole evidence came to the conclusion that the view taken by the learned single Judge was not wrong. I do not take that case to be an authority for the proposition that the railway company's liability ceases as soon as it is shown that there was no defect in the contrivance of the engine, much less that there is no liability unless the plaintiff establishes that there was a defect in any such contrivance. Even the English cases have laid down that where damage has been caused by sparks emitted from a railway engine it is incumbent on the company to show that there was no defect in the contrivance which might have allowed sparks to escape. No doubt in India we have the Railways Act and under section 13 of that Act the Governor-General in Council is authorised to require certain precautions to be taken. But I do not take the enumeration of the precautions mentioned in section 13 as in any way exhaustive; for instance, defects in the contrivance of an engine are not mentioned therein and it cannot be, on the authorities, urged that such a defect would not make the railway company liable. I also think that it is not possible to give a com-

plete catalogue of all sorts of precautions which must be taken by a railway company to ensure that no damage is done to owners of neighbouring lands. Each case must depend on its own circumstances and the court has to decide on the evidence before it whether there has been negligence to such an extent as to make the company liable.

There is obviously no statutory duty on a railway company to cut all grass from the railway track and to see that at no place any grass grows or that any dry grass is allowed to remain there. At the same time this may be a reasonable precaution which a railway company should take, as indeed the B. B. and C. I. Railway Co. have already issued standing orders under which there is a direction that grass should be removed from the railway track. The authority given to a railway company is not merely to run trains and use engines, but to use the whole railway line for purposes of traffic. Their duty is accordingly not confined to trains and engines only. So far as damage caused by sparks emitted from the funnel of an engine is concerned, proof of negligence would depend on the defective nature of the contrivance used to prevent the emission of sparks. So far as fire caused to dry grass growing on or near the railway track is concerned the damage may be caused by the ignition of such grass by live cinders falling from the engine. It is for the court to decide whether dry grass has been allowed to remain on the railway track so close to the rails and so high in stature as to amount to negligence on the part of the railway company. It would be impossible to answer this question in the abstract independently of the facts of each case. In this view of the matter I would feel very reluctant to hold that there was no legal evidence whatsoever before the courts below to arrive at the finding that negligence had been established. Negligence is at least a mixed question of law and fact, and unless it is shown that the court has approached the question from a wrong standpoint or

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that the evidence is such that there was no option but to draw the converse conclusion or unless the finding is vitiated by some other legal defect it may be difficult to upset such a finding in second appeal. I would therefore base my decision on the second point.

The question of contributory negligence had been raised by the defendant in both the courts below, though the finding was against the defendant. As has been pointed out by my learned brother, the utmost that can be said against the railway company is that they were guilty of nonfeasance in not removing dry grass from the railway track when it had grown high. It was to be conceded on behalf of the plaintiff that the plaintiff was guilty of the same omission in not removing dry grass from the vicinity of the railway line. Furthermore, the plaintiff lives on the spot and was aware of the danger and could not but have known that sparks or cinders might come out setting fire to the grass within the railway fencing which would then spread to the dry grass on his own land next to the railway fencing from which it might spread on to the hay stacks which he had put up. He took no precaution either of cutting off his grass farm from the railway fencing or even protecting his hay stacks by making any fire line. The railway company has to maintain hundreds of miles of railroads and the chance of their becoming aware that grass has grown high at a particular spot is far more remote than the definite knowledge which the plaintiff must have possessed that the grass on that part of the railway track was high and so was the grass on his own land adjacent to the railway fencing. It seems to me that the damage which has been caused to the plaintiff was not caused so much by the fire being set to the grass on the railway track as by the circumstance that it spread on to the plaintiff's own grass farm and then reached his hay stacks. If the plaintiff had taken sufficient precaution to maintain a fire line or even if he had cut the grass from the vicinity of the railway fencing first, no damage



would have been caused to him at all. I would therefore allow the appeal and dismiss the plaintiff's claim on the ground that he was guilty of contributory negligence of which he was fully cognisant, and that is a good defence in law which must prevail.

### FULL BENCH

*Before Sir Shah Muhammad Sulaiman, Chief Justice,  
Mr. Justice Bennet and Mr. Justice Iqbal Ahmad*

GAJRAM SINGH AND OTHERS (DEFENDANTS) *v.* KALYAN MAL  
(PLAINTIFF)\*

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*Contract Act (IX of 1872), sections 60, 61—Appropriation of payments—Time up to which the creditor can make appropriation—Appropriation where only one debt, part of it being a secured debt and another part not amounting to a secured debt.*

Where there has been a payment by a debtor to a creditor and no appropriation has been made either by the debtor or the creditor, it is open to the creditor to appropriate the amount or any part of it towards the payment of any debt and at any time, even during the pendency of the litigation concerning the payment, until the judgment is pronounced by the trial court, but not thereafter. If the creditor has not chosen to make any appropriation before then, the provisions of section 61 of the Contract Act come into operation and it is the duty of the court to direct the appropriation in accordance with that section. After the decision of the first court has been passed it would be too late for the creditor to make up his mind to appropriate the payment in a particular way.

Sections 60 and 61 of the Contract Act can not in terms apply to a single debt, but the principle underlying the sections has been applied as between the interest and the principal of a single debt, and may be applied where the debt consists of two definite and specified portions, standing on different footings, and it is possible to treat the two portions of the debt as distinct debts. In the case of a mortgage of joint family property made by the manager, for a debt of which a part only is for legal necessity, if at the time of the mortgage, or at least at

\*First Appeal No. 445 of 1931, from a decree of Bishnu Narain Tankha, Subordinate Judge of Shahjahanpur, dated the 30th of June, 1931.



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the time when a payment is made, it is definitely known that the debt consists of two portions, one of which is binding on the family and the property and the other only on the manager personally, the debtor making a payment can specify to which portion the payment is to be credited, and in the absence of any specification by the debtor the creditor can appropriate the payment towards one or the other portion. But where it is not clearly known and ascertained that the debt consists of two such definite and specified portions, and especially where the mortgagee regards and maintains the entire debt as being one debt binding on the whole family, it is impossible for him to appropriate the payment towards an unknown and unspecified portion of the debt. In such cases no question of appropriation in its strict sense arises, and the payment must of necessity go towards the discharge of the whole debt treated as one single debt, and to be distributed rateably between the two portions as found by the court.

Dr. K. N. Malaviya and Mr. G. S. Pathak, for the appellants.

Dr. S. N. Sen and Messrs. S. B. Johari and N. C. Sen, for the respondent.

SULAIMAN, C.J., BENNET and IQBAL AHMAD, JJ.:—The question referred to this Full Bench for decision consists of two parts:

(a) Where there has been a payment by a debtor to a creditor and no appropriation has been proved either by the debtor or the creditor, is it open to the creditor to appropriate the amount or any part of it towards the payment of any debt and at any time even during the pendency of the litigation concerning the payment?

(b) Whether it is open to a mortgagee of a joint family property, under a mortgage deed executed by the manager of the joint family, when a portion of the mortgage debt was not raised for legal necessity, to appropriate during the pendency of the suit payments made by the mortgagor, towards the discharge of such portion of the debt as was not raised for legal necessity, when no appropriation was made either by the mortgagor or the mortgagee till the date of the suit?

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In this case a mortgage deed had been executed by two brothers, Jagdish Singh and Pitam Singh, in favour of Radha Kishan on the 19th of December, 1916, for Rs.15,000 repayable in three years. On the 18th of April, 1921, a sum of Rs.12,469-12-9 was paid to the mortgagee and an endorsement made on the back of the document under the signature of Jagdish Singh, one of the mortgagors. The details were as follows:

	Rs.	a.	p.
On account of interest and compound interest on the entire amount of principal up to 19th April, 1921 ... ..	7,469	12	0
On account of principal ... ..	5,000	0	0

At the time of the payment there was no specification that the amount or any part of it was being paid or received towards that portion of the mortgage debt which may be for or without legal necessity. The present suit was instituted on the 21st of June, 1930, by the receiver of Radha Kishan's estate. In the plaint, also the plaintiff did not suggest that the amount had been appropriated towards that part of the mortgage debt which might have been without legal necessity. Indeed, his case was that the whole of the mortgage debt had been taken for legal necessity and was therefore binding on the entire joint family of the mortgagors. The contesting defendants took up the position that no part of the mortgage debt had been borrowed for any lawful or family necessity. The trial court held that the entire amount had been borrowed for legal necessity. But on appeal the learned Judges held that out of the principal amount, the sum of Rs.8,500 was for legal necessity, but not Rs.6,370. On this opinion having been expressed, the learned counsel for the plaintiff respondent requested that his client should be allowed to appropriate the whole of the amount previously paid towards that part of the debt which had not been proved to have been for legal necessity.

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It is quite clear that where there are more distinct debts than one, the debtor may, either with express intimation or under circumstances implying that payment is of a particular debt, make the payment, which must, under section 59 of the Contract Act, be applied accordingly. In the absence of any such intimation or such circumstances the creditor has the discretion under section 60 to apply the payment to any debt, even though barred by limitation. The creditor's right to make the appropriation would certainly last until he had done something which puts an end to his option. In the case of *Cory Brothers and Co. v. Owners of the "Mecca"* (1) LORD MACNAGHTEN laid down that the creditor may exercise his right "until the very last moment". It has been held in some cases that the option may be exercised even during the pendency of the suit: See *Seymour v. Pickett* (2) and *Kunjamohan Shaha v. Karunakanta Sen* (3). But no case has been cited where the option has been allowed as of right after the judgment has been pronounced by the first court. It seems to us that if the creditor has not chosen to make any appropriation until the court pronounces its opinion, the provisions of section 61 come into operation, and it is the duty of the court to direct the appropriation in accordance with that section. After the decree of the first court has been passed it would be too late for the creditor to make up his mind to appropriate the payment in a particular way. The appellate court should as a rule pass the decree which the trial court would have passed on the date when it decided the case. The question as to how appropriation has been made is a question of fact, and the appellate court cannot take this fresh matter into consideration without admitting additional evidence in appeal. If the case has to be decided on the record as it stands, the appellate court must assume that no appropriation had been made by the

(1) [1897] A.C., 286 (293). (2) [1905] 1 K.B., 715.  
(3) (1933) I.L.R., 60 Cal., 1265.

creditor at all. The fact that the creditor's counsel offers to make the appropriation in the appeal should not carry any weight. We would, therefore, answer the general question referred to us by saying that the creditor can appropriate the payment to any debt until the judgment is pronounced by the trial court, but not thereafter.

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The second question is not so simple. In terms sections 59 to 61 of the Contract Act cannot apply to a single loan taken by the manager of a joint Hindu family, part of which may be for legal necessity and part not for such necessity. To start with, the debt is one debt and, strictly speaking, not distinct debts. But the principle underlying these sections has been applied to the case of interest accruing on principal, although the two really form part of one single debt and not distinct debts: See *Luchmeswar Singh Bahadur v. Syad Lutf Ali Khan* (1) and also *Maharaja of Benares v. Har Narain Singh* (2). Their Lordships of the Privy Council have also in a recent case as in *Luchmeswar's case* applied the principle of appropriation to interest as distinct from the principal: See *Commissioner of Income-tax v. Maharajadhiraj of Darbhanga* (3).

Where at the time of the mortgage, or at least at the time of the payment, it is definitely known that one portion of it was for legal necessity or in payment of an antecedent debt of the father and therefore binding on the whole joint family, and another portion not such a debt and therefore due from the father personally, it may be possible to treat the two portions of the debt as distinct debts. There is no reason why at the time of the payment the debtor cannot specify that the amount should go towards the discharge of one or the other portion. If such a specification is made, the creditor would be bound to appropriate it accordingly. If the principle underlying these sections were not applicable

(1) (1871) 8 Beng. L.R., 110(112). (2) (1905) I.L.R., 28 All., 25.

(3) (1933) I.L.R., 12 Pat., 318.

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to such a debt, the result would be that even if the sons make the payment in order to discharge that part of the debt which was for legal necessity, the creditor would have the right to appropriate it towards the other part. This, in our opinion, cannot be the legal position.

Similarly, when it is definitely known that the debt consists of two such portions, the creditor in the absence of any specification by the debtor can appropriate the payment towards one or the other portion. In particular, if the payment is made by the executant himself, the creditor may well appropriate it towards that portion of the debt which was due from the payer himself.

But where it is not clearly known that the debt consists of two definite and specified portions, one for legal necessity and the other not so, the debt must be regarded as a single debt and not as two distinct debts. This would be particularly so where the creditor is maintaining that the whole amount was for family necessity. In such a case it is difficult to see how the creditor can make an appropriation towards an unknown portion of the debt. In cases where both the creditor and the debtor treat the debt as one debt, the former regarding the whole as a joint family debt due from the whole family and the latter as a debt due personally from the manager, it would be difficult for either party to make appropriation without specifically splitting up the debt. In such cases if the amount is paid and received towards the whole debt, it must of a necessity go towards the discharge of the whole debt treating it as one single debt. In such an event no question of appropriation in its strict sense arises. It would be just and equitable to distribute the payment rateably between the two portions as found by the court. This would be all the more so, if the creditor maintains till the time of the passing of the decree that the whole debt was one debt binding on the entire family, and leaves it to the court to decide the matter.

The question in this form did not arise in the case of *Ram Nath v. Chiranji Lal* (1), nor was it decided. In that case the creditor was willing to allow a rateable distribution, and it was the debtor who was saying that the whole of the amount should be appropriated towards that part of the debt which was for legal necessity. As the debtor's option must be exercised at the time of the payment, the debtor had in that case already lost his option and could not compel the creditor to appropriate the amount in a particular way. In the absence of any express specification by the creditor, the court upheld the rateable distribution of the amount. The word "appropriation" as used in that judgment did not mean the exclusive appropriation to one part of the debt, but its rateable distribution between the two portions of the debt.

Our answer to the other part of the question is that when the two portions of the debt have not been definitely ascertained, and the mortgagee regards the whole debt as one debt, it is not open to the creditor to appropriate the payment towards an unknown and unspecified portion of the debt; but he may make the appropriation if the two portions are definitely ascertained, in such a way as to make them constitute two distinct debts, although parts of the same loan.

This is our answer to the question referred to us.

#### REVISIONAL CIVIL

Before Mr. Justice Collister and Mr. Justice Bajpai

SARJULAL BEHARILAL (DECREE-HOLDER) v. SUKHDEO PRASAD AND OTHERS (OBJECTORS)\*

1935  
December, 17

*Civil Procedure Code, order XXI, rule 58—Claimant's objection to attachment of property—Proceeding in execution—Reference to arbitration ultra vires—Jurisdiction—Civil Procedure Code, section 141; schedule II, paragraph 1.*

\*Civil Revision No. 477 of 1934.

(1) (1934) I.L.R. 57 All, 605.

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An objection under order XXI, rule 58 of the Civil Procedure Code, creating as it does a dispute between the decree-holder and a person claiming property which the decree-holder seeks to put to sale as being the property of his judgment-debtor, is a matter relating to the execution, discharge or satisfaction of a decree and is a proceeding in execution. Such a proceeding can not be made the subject of a reference to arbitration. Schedule II, paragraph 1 of the Civil Procedure Code is not in terms applicable to such a proceeding, nor can it be made applicable by virtue of section 141 of the Code, for that section applies to "original matters" and not to proceedings in execution. Accordingly the court has no jurisdiction to refer to arbitration a dispute under order XXI, rule 58, and such a reference is *ultra vires*.

Messrs. *H. P. Agarwal* and *D. P. Malaviya*, for the applicant.

Mr. *Ambika Prasad*, for the opposite parties.

COLLISTER and BAJPAI, JJ.:—The applicants in this case are a firm and they sued a certain person on a promissory note and obtained a decree for Rs.1,900 odd. Thereafter they took out execution and applied for the sale of certain property which had been attached before judgment. An objection under order XXI, rule 58 of the Civil Procedure Code was made by the sons of the judgment-debtor and certain other relatives of his. On the application of the parties the matter was referred to arbitration and in due course an award was submitted to the court. An objection to the award was made on behalf of the decree-holders, but it was dismissed by the court and the award was confirmed.

Two points have been taken before us by learned counsel for the applicants. One is that the court had no jurisdiction to refer the matter to arbitration and acted *ultra vires*, and the other is that the award is invalid for the reason that the judgment-debtor himself, who had been impleaded in the proceedings under order XXI, rule 58, was not a party to the agreement to refer the matter to arbitration.



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As regards the first point, learned counsel contends that schedule II of the Civil Procedure Code does not apply to proceedings in execution and therefore the court had no jurisdiction to refer the dispute to arbitration; the award is consequently invalid and the order of confirmation is bad. On behalf of the opposite party it is pleaded that a proceeding under order XXI, rule 58 is not a proceeding in execution at all; but if it be held to be such, then learned counsel contends that, although schedule II does not apply in terms, yet it is rendered applicable by the provisions of section 141 of the Civil Procedure Code.

As regards the question whether the trial of an objection under order XXI, rule 58 is a proceeding in execution learned counsel for the opposite party contends that it is not a matter which relates to the execution, discharge or satisfaction of a decree. He relies upon *Sheonandan Chowdhury v. Debi Lal Chowdhury* (1), and *Diljan Mihha Bibi v. Hemanta Kumar Roy* (2). In the Patna case the court held that an application under order XXI, rule 100 was not an application in execution of a decree, but was an original matter in the nature of a suit; and after discussing the Privy Council case of *Thakur Prasad v. Fakir Ullah* (3), to which we shall have occasion to refer later on, the court held that order IX, rule 4 of the Civil Procedure Code would apply by force of section 141 to a proceeding under order XXI, rule 100. The learned Judges held that the Privy Council case above referred to was an authority for the proposition that order IX, rule 4 would apply by force of section 141 to original matters in the nature of suits. Similarly in *Diljan Mihha Bibi v. Hemanta Kumar Roy* (2), a Bench of the Calcutta High Court held that an application for setting aside a sale under order XXI, rule 90 of the Civil Procedure Code was not an application for execution; it was a miscel-

(1) (1923) I.L.R. 2 Pat., 372.

(2) (1915) 29 Indian Cases, 395.

(3) (1894) I.L.R. 17 All., 106.



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laneous proceeding in the nature of an original proceeding in which the auction purchaser was the principal interested party. The learned Judges accordingly held that where an application for setting aside an execution sale under order XXI, rule 90 had been dismissed for default and an application for restoration was made, order IX, rule 9 of the Civil Procedure Code was applicable. In the case of *Hari Charan Ghose v. Manmatha Nath Sen* (1), which was decided a year previously to the above mentioned case, a Bench of the same High Court held that order IX, rule 13 of the Civil Procedure Code was not applicable to a proceeding under rules 100 and 101 of order XXI. This case was referred to in *Diljan Mihha Bibi v. Hemanta Kumar Roy* (2), but the learned Judges seem to have distinguished it partly on the ground that it merely laid down the proposition that *all* the provisions of order IX were not applicable to proceedings in execution and partly on the ground that in that case there was no necessity in the interests of justice that order IX, rule 13 should be applied because the order was not conclusive but was subject to the right of a person aggrieved to institute a suit.

In our opinion an objection under order XXI, rule 58, creating as it does a dispute between the decree-holder and a person claiming property which the decree-holder seeks to put to sale as being the property of his judgment-debtor, is a matter relating to the execution, discharge or satisfaction of a decree and is a proceeding in execution.

The next point to determine is whether schedule II of the Civil Procedure Code is applicable by virtue of section 141 to such a proceeding. In *Thakur Prasad v. Fakir Ullah* (3) an application for execution of a decree had been struck off on the decree-holder's own petition and thereafter a second application was made within the

(1) (1913) I.L.R., 41 Cal., 1. (2) (1915) 29 Indian Cases, 395.

(3) (1894) I.L.R., 17 All., 106.

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period of limitation. Their Lordships of the Privy Council held that, although the petition for execution had been withdrawn without leave to apply again having been expressly granted by the court, the petitioner's right to renew his petition within due time remained; the provisions of section 373 (which corresponds to order XXIII, rule 1 of the present Code) which could only have applied through the effect of section 647 (i.e., section 141 of the present Code) had not been rendered applicable thereby to petitions for execution. At page 111 their Lordships observe as follows:

"It is not suggested that section 373 of the Civil Procedure Code would of its own force apply to execution proceedings. The suggestion is that it is applied by force of section 647. But the whole of chapter XIX of the Code, consisting of 121 sections, is devoted to the procedure in executions, and it would be surprising if the framers of the Code had intended to apply another procedure, mostly unsuitable, by saying in general terms that the procedure for suits should be followed as far as applicable. Their Lordships think that the proceedings spoken of in section 647 include original matters in the nature of suits such as proceedings in probates, guardianships and so forth and do not include executions."

In *Bharat Indu v. Asghar Ali Khan* (1) a Bench of this Court, following *Thakur Prasad v. Fakir Ullah* (2), and *Hari Charan Ghose v. Manmatha Nath Sen* (3), held that order IX of the Civil Procedure Code does not apply to a case where an application for execution is dismissed for default. In *Bachan Lal v. Amar Singh* (4) the representatives of a decree-holder took out execution. The judgment-debtors objected and ultimately the matter was referred to arbitration. Meanwhile a third person sued the representatives of the decree-holder on a promissory note and attached the decree before judgment. Subsequently he made an objection impugning the arbitration proceedings and the award. A learned single Judge of this Court held

(1) (1922) I.L.R., 45 All., 148.

(2) (1894) I.L.R., 17 All., 106.

(3) (1913) I.L.R., 41 Cal., 1.

(4) A.I.R., 1935 All., 125.

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that an execution proceeding is not a suit, and therefore schedule II does not entitle the parties to an execution proceeding to file an application for a reference to arbitration; the arbitration proceedings were therefore invalid and the court was not entitled to enforce the award. In *Hari Charan Ghose v. Manmatha Nath Sen* (1), to which reference has already been made, the Court in discussing section 141 observed at page 4 as follows:

"This section" (i.e. section 141) "reproduces with modifications section 647 of the previous Code, but in section 647 there was an explanation in these terms; 'This section does not apply to applications for the execution of decrees, which are proceedings in suits.' That explanation has been omitted and it has been argued before us that this omission is an indication that the legislature in passing the present Code intended that section 141 should have a wider operation than section 647. There is a certain amount of force in this argument, but it overlooks the history of this section and the case law. At one time there was a considerable divergence of opinion as to whether section 647 applied to execution proceedings; and it was in consequence of this that by Act VI of 1892 this explanation was introduced into the section of the Code of 1882. But after this alteration in the law the Privy Council by a case, *Thakur Prasad v. Fakir Ullah* (2), decided on section 647, as it stood before the explanation was added, that the section did not apply to execution proceedings. The purpose of the legislature in omitting that explanation was to do away with that which was shown to be unnecessary by the Privy Council decision and to rely upon the terms of the section as interpreted by the Privy Council. So it was that the explanation came to be omitted. This may have been an unfortunate way of proceeding, because it involves some knowledge of the history of section 647 and of the decision on that section to appreciate the effect of this change; but this is how the matter was dealt with by the legislature. The result is that section 141 does not make applicable to proceedings in execution all the procedure provided by the Code."

In *T. Wang v. Sona Wangdi* (3), a Bench of the Calcutta High Court held that a court was not com-

(1) (1913) I.L.R., 41 Cal., 1.

(2) (1894) I.L.R., 17 All., 106.

(3) (1924) I.L.R., 52 Cal., 559.

petent to refer to arbitration a dispute between a judgment-debtor and his decree-holder and the award was therefore invalid and unenforceable. The learned Judges observe at page 563 as follows:

"Nothing has been shown to us to persuade us to hold that there is any speciality in the second schedule which makes it applicable to questions arising in the execution of decrees. . . . As has been explained in *Hari Charan Ghose v. Manmatha Nath Sen* (1), the law is the same as it was under section 647 of the Code of 1882 which expressly excluded execution proceedings from those to which provisions relating to suits were extended. The view that the special procedures in suits do not apply to execution of decrees is based on the supposition that order XXI relating to executions is self-contained and exhaustive as to the special subject with which it deals."

The case of *Sattar-un-Nissa v. Shaikh Muhammad Ruhulla* (2) supports the contention of learned counsel for the opposite party. After discussing the Privy Council case of *Thakur Prasad v. Fakir Ullah* (3) the learned Judges observed that "There does not appear to be anything unsuitable to apply chapter XXXVII" (which is equivalent to schedule II of the present Code) "to proceedings in execution of decrees and we are not prepared to accept this view."

On a careful consideration of the view expressed by their Lordships of the Privy Council in *Thakur Prasad v. Fakir Ullah* (3) we are of opinion that an objection under order XXI, rule 58 of the Civil Procedure Code cannot be held to be an "original matter" as contemplated by their Lordships; we think that it is a proceeding in execution and we hold on the authority of the above mentioned case that the provisions of schedule II are not applicable. It is obvious that schedule II does not apply of its own force and in our opinion it is not rendered applicable under the provisions of section 141.

The above being our view, it is not necessary for us to deal with the other plea which has been argued by

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(1) (1913) I.L.R., 41 Cal., 1.

(2) (1905) 8 Oudh Cases, 263.

(3) (1894) I.L.R., 17 All., 106.

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learned counsel for the applicants. We accordingly allow this application with costs and set aside the order of the court below confirming the award and we direct that the objection under order XXI, rule 58 be tried according to law.

### FULL BENCH

*Before Sir Shāh Muhammad Sulaiman, Chief Justice,  
 Mr. Justice Bennet and Mr. Justice Bajpai*

1935  
 December, 19

BHARATPUR STATE (PLAINTIFF) v. SRI KISHAN DAS  
 AND OTHERS (DEFENDANTS)\*

*Hindu law—Alienation by father—Suretyship for payment of money—Mortgage of joint ancestral property by father as security for due payment of rent under a lease taken by him of certain property—Lease not executed for legal necessity—Antecedent debt.*

Where the father in a joint Hindu family took a lease of a village for nine years at an annual rent of Rs.2,700, and three months afterwards executed a mortgage of joint ancestral property for Rs.8,000 by way of security for the due payment of the rent; and it was found that the transaction was not supported by legal necessity or benefit to the estate:

*Held* that in these circumstances, and if there was no antecedency of the original debt or liability in point of time and in fact, the hypothecation of joint ancestral property by way of security was invalid.

*Held*, also, on the question of antecedent debt,—

(1) If the execution of the lease and the subsequent execution of the security bond were part and parcel of the same transaction, then obviously there could be no antecedent debt in point of time or fact.

(2) [*Per* SULAIMAN, C.J.; BENNET, J., concurring; BAJPAI, J., *contra*] If, however, the two transactions were separate and independent, the first would be antecedent in point of time. If the pecuniary liability incurred under the lease was certain, definite and unconditional, it would amount to a debt, even though the payment was to be by future instalments. But if under the terms of the lease the pecuniary liability were not only contingent but also conditional, and might accrue in certain

\*First Appeal No. 233 of 1931, from a decree of Nawab Hasan, Subordinate Judge of Aligarh, dated the 11th of March, 1931.

contingencies and might not accrue in others, then the legal liability would not amount to the incurring of a debt.

(3) The Mitakshara puts suretyship as something distinct and different from debts. Even in those classes of suretyship in which the Hindu law makes the liability binding on the heirs of the surety it is the sons only and not the grandsons who are so declared liable; to hold that the father could make a valid alienation of the family property on account of his suretyship obligation, without there being an antecedent debt, would mean that the liability was binding on the grandsons also. The liability of the sons to pay a debt is not the same thing as the right of the father to alienate the property to discharge the debt. The validity of an alienation in discharge of an antecedent debt is an exception to the general rule of want of authority in the father to transfer property without legal necessity or benefit to the estate, and the exception should not be extended to the case of a suretyship where no antecedency in point of time and fact exists.

The facts of the case would appear from the Referring Order which was as follows:

COLLISTER and BAJPAI, JJ.:—This is a plaintiff's appeal, the plaintiff being the Bharatpur State through its Administrator. On the 15th of January, 1924, Bohra Dip Chand deceased, who was the father of defendants second set, took a lease of the village of Pani Gaon for a period of nine years from the plaintiff at an annual rental of Rs.2,700. On the 24th of April, 1924, he executed a security bond for Rs.8,000 for due payment of the lease money and by means of that security bond he mortgaged a certain property in the village of Kanchrouli. Bohra Dip Chand defaulted in payment of the lease money in 1332 and 1333 Fasli; and then he gave up the lease, and soon afterwards he died. Thereafter the plaintiff State sued the sons of Bohra Dip Chand, i.e., defendants second set, for recovery of the arrears of rent in respect to 1332 and 1333 Fasli and the suit was decreed by a revenue court in the district of Muttra on the 25th of May, 1928. That decree was subsequently transferred for execution to Aligarh, in which district the property in suit is situated; and in execution of the said decree the property in suit was attached and the 21st of October, 1929 was fixed for sale. Meanwhile, however, defendants first set, having obtained in 1927 a simple money decree against Bohra Dip Chand and his son Sardar Singh defendant No. 6, put the property in suit to sale and purchased it themselves on the 21st

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of August, 1929. They accordingly filed an objection under order XXI, rule 58 of the Civil Procedure Code in the execution proceedings of the plaintiff, and on the 19th of December, 1929, the executing court passed an order to the effect that the property in suit could not be sold in execution of the decree for arrears of rent of the Bharatpur State, but at the same time the court recorded a finding that there was a charge of Rs.8,000 of the State on the property in suit, for recovery of which the State was competent to sue. The plaintiff State has accordingly instituted the present suit for recovery of the said amount with interest and costs by sale of the property in suit.

The suit was contested by defendants first set and the main ground of contest was that the property in suit was the joint ancestral property of Bohra Dip Chand and his sons and that the mortgage was without legal necessity and was therefore invalid. \* \* \* \*

The Subordinate Judge of Aligarh, who tried the suit, has found against the plaintiff on the main issue; that is to say, he has found that Bohra Dip Chand was not competent to charge the property under the hypothecation bond of the 24th of April, 1924, which he executed by way of security. The suit has accordingly been dismissed with costs and the plaintiff State has come to this Court in appeal. \* \* \* \*

Various pleas have been taken before us by learned counsel for the plaintiff appellant; but some of them can be briefly disposed of. [These not being material for the purpose of the report have been omitted here.]

It is, however, pleaded that the hypothecation bond was executed to liquidate an antecedent debt inasmuch as the mortgage bond would only become operative when a debt or liability came into existence; that is to say, when the hypothecation bond became operative, there would already be an existing liability. The position was this: The hypothecation bond was executed as security for payment of a potential debt; and when the potential debt became an actuality, the hypothecation bond would automatically come to life. Thus its operativeness was dependent upon the contingency of a future debt coming into existence; and when that occurred, the hypothecation bond would *ipso facto* become enforceable. The happening of these two events would be to all intents and purposes simultaneous and in our opinion it cannot be held that there was any such



antecedence in time as was contemplated by their Lordships of the Privy Council in *Brij Narain v. Mangal Prasad* (1), and as would render the sons' interests in the ancestral property liable to sale under the mortgage.

\* \* \* \* \*

The last point which arises in this appeal is whether or not Bohra Dip Chand was competent to charge the ancestral property as security for payment of the lease money as it fell due under the deed of lease dated the 24th of April, 1924. In the case of *Maharaja of Benares v. Ramkumar Misir* (2) one Ram Prasad took a lease of four villages from the Maharaja of Benares and in order to secure due payment of the rent a surety bond was entered into by the lessee himself and two other persons, each surety hypothecating certain property as security. The rent for certain years fell into arrears and the Maharaja sued in the revenue court and obtained a decree; and having failed to realise the decretal money by execution in the revenue court, he sued the sons of Ram Prasad and of the two other securities, the fathers being then dead. A Bench of this Court held that the property was liable under the hypothecation bonds. No plea appears to have been taken in that case to the effect that only a personal liability would rest upon the son of a surety for payment of money. In *Chakhan Lal v. Kanhaiya Lal* (3) the question of a son's liability for the suretyship of his father was considered by the learned CHIEF JUSTICE and KENDALL, J. They referred to the case of *Maharaja of Benares v. Ramkumar Misir* (2) and observed that in that case "The contention that the text and the commentary (i.e. of the Mitakshara) refer only to a case where the amount has been previously paid and exists as a debt was repelled by this High Court"; but they expressed the view that "the liability of the father as surety did not entitle him to alienate the family property." They accordingly held that a charge which the father had created upon the family property as a surety was not a valid charge, but that his liability as surety still held good and that it could not be repudiated by the sons. In *Mata Din Kandu v. Ram Lakhan* (4) a different view appears to have been taken by YOUNG, J., and BENNET, J., who followed the view which was taken in the case of *Maharaja of Benares v. Ramkumar Misir* (2), and they remarked that no authority to the contrary had been shown to them, from which observation it

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(1) (1923) I.L.R., 46 All., 95.  
(3) [1929] A.L.J., 199.

(2) (1904) I.L.R., 26 All., 611.  
(4) (1929) I.L.R., 52 All., 153.



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is clear that the case of *Chakhan Lal v. Kanhaiya Lal* (1) was not referred to. The Privy Council case of *Brij Narain v. Mangal Prasad* (2) and the propositions of law laid down therein were discussed and in that connection the court observed as follows: "But we are of opinion that in laying down these five propositions their Lordships of the Privy Council had no intention to apply the propositions to a case like the present, which is a case of a hypothecation bond of suretyship. There was no mention at all in the judgment of their Lordships of any such question having been raised before them. We consider that if their Lordships had intended to lay down the proposition that a Hindu father could not bind the estate of the joint family by hypothecating the estate for the purpose of suretyship, the proposition would have been clearly stated in the judgment of their Lordships. We consider that a proposition of such an importance as that in the present case would not have been laid down by their Lordships merely by implication, but would have received separate treatment and consideration. Accordingly, as we consider that this ruling of their Lordships is not intended to apply to the circumstances of the present case, we consider that we ought to follow the ruling in *Maharaja of Benares v. Ramkumar Misir* (3)."

In the case of *Dwarka Das v. Kishan Das* (4) the existence of some difference of opinion in this Court was recognized. As regards other High Courts, we have been referred to *Hira Lal Marwari v. Chandrabali Haldarin* (5), *Rasik Lal Mandal v. Singheswar Rai* (6) and *Brij Nath Prashad v. Bindeshwari Prasad* (7). In view of the conflict which appears to exist, particularly in this Court, as to whether a son's liability for security given by his father is a personal liability or whether a valid charge can be made by the father on the ancestral property, we are of opinion that the matter is one which should be decided by a Full Bench. We accordingly direct that the case be laid before the Hon'ble Chief Justice with a request that the following question be referred for determination to a Full Bench:—

Whether the father of a joint Hindu family can lay a valid charge upon the ancestral property as security for the payment of the rent which would fall due under a deed of lease which had been executed by himself and which has been found to have been executed otherwise than for the benefit of the family or for family necessity.

(1) [1929] A.L.J., 199.

(3) (1904) I.L.R., 26 All., 611.

(5) (1908) 13 C.W.N., 9.

(2) (1923) I.L.R., 46 All., 95.

(4) (1933) I.L.R., 55 All., 675.

(6) (1912) I.L.R., 39 Cal., 843.

(7) A.I.R., 1925 Pat., 609.

Messrs. *P. L. Banerji* and *N. Upadhiya*, for the appellant.

Messrs. *Panna Lal* and *S. B. L. Gaur*, for the respondents.

SULAIMAN, C.J.:—I am doubtful whether any question as to the existence of an antecedent debt has been referred to us. In the body of the order of reference there is a clear expression of opinion that no antecedent debt existed, though the form in which the question referred to us is framed does not preclude such a consideration.

If the execution of the original lease and the subsequent execution of the security bond were part and parcel of the same transaction, then obviously there could be no antecedency in fact or in point of time. The two transactions would become one and the alienation, if without legal necessity and not for the benefit of the estate or the family, would be unjustified.

If, however, the two transactions were separate and independent, the first would be antecedent in point of time. If the pecuniary liability incurred under the lease were certain, definite and unconditional, it would in my opinion amount to a debt, even though the payment were to be by future instalments. For instance, a person may borrow money promising to pay it after five years; he owes the debt from the very moment of borrowing, though he cannot be sued before the expiry of five years. Or again a person may purchase a motor car promising to pay the price after a year; he has incurred a debt, although the debt does not become recoverable until after the expiry of one year. But if under the terms of the lease the pecuniary liability were not only contingent, but also conditional and may accrue in certain contingencies and may not accrue in others, then the legal liability may not amount to the incurring of a debt. In the present case the execution of the security bond was really an offer of a further security in addition to the personal liability previously

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incurred. It was not a case of a discharge or repayment of an antecedent debt. As the terms of the lease are not before us, it is impossible to express any final opinion on this matter.

On the main question, even after hearing the point argued afresh, I adhere to the opinion expressed in the case of *Chakhan Lal v. Kanhaiya Lal* (1). It is not necessary for me to add to what has been already said there. I may only say that the primary idea of suretyship is an undertaking to indemnify if some other person does not fulfil his promise. Again, under the Hindu law the pecuniary liability for suretyship is binding on the sons only and not on the grandsons. To hold that an alienation can be made straight off without there being an antecedent liability would mean that the alienation would be binding not only on the sons but also on the grandsons. The liability of the sons to pay a debt is not the same thing as the right of the father to alienate the property to discharge the debt. One creates a liability which can be met out of the family property and the other involves an alienation out and out. The Mitakshara puts suretyship as something distinct and different from debts. The two are dealt with separately in different sections. Now the validity of an alienation in discharge of an antecedent debt has been characterised by their Lordships of the Privy Council in *Sahu Ram Chandra v. Bhup Singh* (2) as an exception to the general rule of want of authority in the father to transfer property without legal necessity or when there is no benefit to the estate, and their Lordships have observed that the exception should not be extended. I would, therefore, hesitate to apply the exception to the case of a suretyship where no antecedency in point of time exists.

BENNET, J.:—I agree with the opinion of the learned CHIEF JUSTICE.

(1) [1929] A.L.J., 199.

(2) (1917) I.L.R., 39 All., 437(444)-

BAJPAI, J.:—The facts of this case are stated at length in the referring order and the question of law that we have got to decide is: "Whether the father of a joint Hindu family can lay a valid charge upon the ancestral property as security for the payment of the rent which would fall due under a deed of lease which had been executed by himself and which has been found to have been executed otherwise than for the benefit of the family or for family necessity."

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Learned counsel for the appellant argued that it was open to him to go into the facts of the case and to show that the charge upon the ancestral property was made in lieu of an antecedent debt and as such was valid and that the way in which the question was formulated did not suggest that the charge was not in lieu of an antecedent debt. I am of the opinion that this point has been already decided by the Bench which has referred the question to us, and that it is permissible to us to look into the order with a view to satisfying ourselves whether the matter has or has not been decided by the Bench. The order says: "It is, however, pleaded that the hypothecation bond was executed to liquidate an antecedent debt inasmuch as the mortgage bond would only become operative when a debt or liability came into existence; that is to say, when the hypothecation bond became operative, there would already be an existing liability. The position was this: The hypothecation bond was executed as security for payment of a potential debt; and when the potential debt became an actuality, the hypothecation bond would automatically come to life. Thus its operativeness was dependent upon the contingency of a future debt coming into existence; and when that occurred, the hypothecation bond would *ipso facto* become enforceable. The happening of these two events would be to all intents and purposes simultaneous and in our opinion it cannot be held that there was any such ante-

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cedency in time as was contemplated by their Lordships of the Privy Council in *Brij Narain v. Mangal Prasad* (1), and as would render the sons' interests in the ancestral property liable to sale under the mortgage."

*Bajpai, J.*

Even if the question were open, I am of the opinion that it is impossible to hold that the security bond executed by Bohra Dip Chand, the father, was in lieu of an antecedent debt as understood in Hindu law. The facts are that Dip Chand took a lease of some property on the 15th of January, 1924, from the Bharatpur State on an annual rent of Rs.2,700 for nine years, and on the 24th of April, 1924, he executed a security bond in which he mentioned the fact that he had taken a lease for nine years and that the Bharatpur State had demanded a security of Rs.8,000 from him in respect of the said lease and therefore he was hypothecating 137 odd bighas of land of khewat No. 1 in village Kanchroli. It has been found that the above mentioned property is ancestral property. The lease which Bohra Dip Chand had taken from the Bharatpur State is not on the record of the case, and it may well be that one of the conditions of the lease was that the lessor would have to execute a security bond, in which event the two transactions would be practically one and there would be no "real dissociation in fact". Apart from that the lease was taken, as appears from the evidence of Chaubey Gopi Nath, an employee of the Bharatpur State, at an auction sale held some time in July, 1923, although the thekanama itself was executed on the 15th of January, 1924. We do not know whether any sum was paid by Bohra Dip Chand on the date of the auction, and it may well be that a year's rent was paid in advance, and even if nothing was paid the annual rent was not due at the time when the security bond was executed in April, 1924. It is true that an undertaking had been given by Dip Chand when he took the lease and that undertaking involved

(1) (1923) I.L.R., 46 All., 95.

a pecuniary liability, but the question is whether it is possible to construe that undertaking involving a pecuniary liability as a debt. It must be remembered that the general principle in regard to the power of the father under the Mitakshara law in his capacity of manager and head of the family with reference to the joint family property is that "he is at liberty to effect or to dispose of the joint property in respect of purposes denominated necessary purposes. The principle in regard to this is analogous to that of the power vested in the head of a religious endowment or muth, or of the guardian of an infant family", but side by side with this principle is the fact that there is "an obligation of religion and piety which is placed upon the sons and grandsons . . . to discharge their father's debts", and "although the correct and general principle be that if the debt was not for the benefit of an estate then the manager should have no power either of mortgage or sale of that estate in order to meet such a debt, yet an exception has been made to cover the case of mortgage or sale by the father in consideration of an antecedent debt", and it was observed by their Lordships of the Privy Council in the case of *Sahu Ram Chandra v. Bhup Singh* (1), from which ruling I have been quoting freely, that "this being an exception from a general and sound principle . . . the exception should not be extended and should be very carefully guarded." This conflict was noticed again by their Lordships of the Judicial Committee in the case of *Brij Narain v. Mangal Prasad* (2), and they observed: "It is enough to say that both principles are firmly established by long trains of decision, and it certainly occurs to the view that the term 'antecedent debt' represents a more or less desperate attempt to reconcile the conflicting principles."

In the present case the father had not borrowed any sum of money from any creditor prior to the execution

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(1) (1917) I.L.R., 39 All., 437.

(2) (1923) I.L.R., 46 All., 95.

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of the security bond, and it cannot be said that the bond was executed in lieu of the former borrowing. The bond was in the sum of Rs.8,000, and in no case can it be said that by the time of the execution of the bond he had become liable to pay this sum. The undertaking for the payment of the annual rent given by the father was to mature into a pecuniary liability at a date subsequent to the execution of the bond, and, as such, there was no antecedency in time, and in the absence of the lease it is not possible to say that there was any real dissociation in fact; on the contrary the circumstances suggest that the execution of the security bond was one of the conditions on which the lease was given.

Coming to the question which has been referred to us, I am of the opinion that the father of a joint Hindu family cannot lay a valid charge upon the ancestral property under the circumstances mentioned in the question.

In chapter VI, section IV, § 53 of the Mitakshara, it is laid down as follows: "Suretyship is enjoined for appearance, for confidence, and for payment. On failure of either of the first two, the surety himself in each case shall pay; on that of the third, his sons also must pay."

As pointed out by RANADE, J., in the case of *Tukarambhat v. Gangaram Mulchand* (1):

"Brihaspati recognizes four different classes of sureties: (1) sureties for appearance, (2) sureties for honesty, (3) sureties for payment of money lent, and (4) sureties for delivery of goods. The obligation of the first two kinds of sureties is limited to themselves personally, and does not bind their sons; but the obligation incurred by the last two kinds of sureties binds them and their sons also after their death. The commentary of Ratnakar on this text expressly states that the sons shall be compelled to pay debts incurred by their father under the last two classes of surety obligations. The texts of Narad and Yajnavalkya recognize three classes of surety obligations only,—

(1) (1898) I.L.R., 23 Bom., 454(459, 460).



those for appearance, those for honesty, and those for payment. Narad does not set forth the son's obligation in this place, but the Yajnavalkya text is quite as explicit as that of Brihaspati. The sureties of the first two classes must pay the debt, and not their sons, but the sons of the last kind of surety may be compelled to pay their father's debt incurred by him as surety. Katyayana refers to the same kind of surety when he lays down that the grandson of such a surety need on no account pay the debt, but the son must make it good without interest. The text of Vyasa makes the same distinction between the son's and the grandson's liabilities for such suretyship. Manu's texts on the subject clearly distinguish between sureties for appearance or good behaviour, and sureties for payment. The son shall not, according to Manu, in general be compelled to pay money due for suretyship, or idly promised to musicians and actresses, or lost at play, or due for spirituous liquors, or for tolls or fines. The general words "money due for suretyship" used in the text are expressly stated by the commentator Kulluka to refer only to sureties for appearance and good behaviour, but as regards a surety for payment, it is enjoined that the Judge may compel even his heirs to discharge the debt. Even as regards the first two classes of sureties, if they have derived any advantage, or received a pledge, their heirs may be compelled to pay the debt. The commentator Haradatta explains a similar text of Gautama by affirming the same distinction. This exposition of the authorities removes all apparent conflict, and the Pandits whose advice was sought by the late Sadar Diwani Adawlat in the case of *Moolchund v. Krishna* (1) must have based their opinion on these same texts, though there is no express mention of the texts in the judgment. The more general texts which class suretyship obligation with reckless and immoral debts must, therefore, be qualified by the particular texts quoted above, and when so explained, it becomes clear that they refer to particular classes of sureties which do not include sureties for payment of debts, in respect of which last class, unless the debts can be shown to have been incurred for immoral or illegal purposes, the sons are liable to discharge their father's debts."

It would thus appear that there is an obligation on the *sons only* when the father is a surety for payment of money lent or, at least, for delivery of goods and not when he stands surety for appearance or for honesty and

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(1) (1844) Bellasis' Reports, 54.



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so far as Narad is concerned he does not set forth the son's obligation even in these two cases; but none of the ancient law-givers would make the *grandson* liable in any class of suretyship. In ancestral property the grandson has a vested interest by birth and it would be anomalous to hold that although the grandson is under no pious obligation to pay his grandfather's debts incurred as a surety, the grandfather has the right to lay a valid charge on ancestral property for payment of debts incurred by him as a surety.

I have already in an earlier part of my judgment emphasised the conflict that exists in the two principles, namely the limitation imposed on the father of a joint Hindu family in connection with the alienation of the family property when he has sons and grandsons, and the pious obligation of the son and the grandson to pay his father and his grandfather's debts if they are not tainted with immorality, and the attempts to reconcile the conflicting principles, one of such attempts being to give to the father power to alienate ancestral property in lieu of an antecedent debt, but I am not prepared to introduce a further head and to say that a father can mortgage or alienate ancestral property in discharge of debts incurred as "a surety for payment". One anomaly I have already pointed out and I can see no serious difficulty in reconciling the two principles at least so far as the question of suretyship is concerned. The son (and not the grandson) is liable to discharge the debts incurred by his father as a surety for payment; that is his personal obligation and if the creditor is alert he can obtain relief as long as the personal remedy is open to him, for if he were to obtain a decree within the time available for a personal decree the ancestral property might become liable by being taken in execution on the back of the decree, but it is not possible for him to enforce the mortgage after the personal remedy has become barred by time. In the case of *Brij Narain v*

*Mangal Prasad* (1), mentioned above, their Lordships of the Privy Council summed up five propositions in connection with the powers of a manager and a father regarding joint ancestral property, and although it cannot be said that these five propositions are fully exhaustive, yet I venture to suggest that if the father had such a power as is contended for by the appellant, one might have expected another proposition.

It is not necessary for me to discuss the various authorities that were cited before us at the Bar, and I hold the view that the case of *Chakhan Lal v. Kanhaiya Lal* (2) takes the correct view of the law on the subject. It is one thing to say that the son is under a pious obligation to pay his father's debts incurred as a surety for payment and it is quite another thing to say that a father can lay a valid charge upon the ancestral property for payment of such a debt. The liability of the son is personal and can be enforced only as long as the personal remedy is alive, and recourse might be had by the creditor against the property in the hands of the son after he has obtained a simple money decree.

My answer to the question that has been referred to us is in the negative.

By THE COURT:—(1) Even if an answer be wanted, no definitive answer can be given as to the antecedency or otherwise of the liability under the lease without knowing the terms of the lease.

(2) In case there is no antecedency in point of time and in fact, the hypothecation of joint ancestral property by way of security would not be valid without the existence of legal necessity or benefit to the estate.

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(1) (1923) I.L.R., 46 All., 35.

(2) [1929] A.L.J., 199.

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GAURI SHANKAR AND OTHERS (DEFENDANTS) v. MAHARANI  
HEMANT KUMARI (PLAINTIFF)\*

*Bathing Ghat—Dedication to public use without creating a trust—Rights of dedicator—Suit to eject squatters—Bathing ghat in Benares constructed and maintained by owner of the site for the public use—Ghatias occupying specific portions of ghat—Licensees—Prescriptive right—Customary right—Invasion of rights of the public.*

The plaintiff's predecessor purchased some land on the banks of the Ganges in Benares, built a masonry ghat thereon and dedicated it to the public use although no deed of endowment or trust had been executed. The public had been using the ghat for generations. The ghat was maintained and repaired by the plaintiff and her predecessors and they also had been realising toll from the stall keepers who sat on the ghat on festivals. The defendants were ghatias, who and whose predecessors had been occupying different portions of the ghat for generations, having put up *takhts* and canopies on poles let into holes on the pavement and stairs, leaving a width of about four feet only between the *takhts* for the bathers to pass down to the river; and they had been taking alms and gifts from the bathing public at the ghat, for assisting them in the performance of bathing and other religious rites. In a suit by the plaintiff against the defendants it was *held* that—

(1) As no trustee or manager had been appointed to look after the ghat on behalf of the public, the plaintiff as heir of the original donor was entitled to maintain the suit, the object of which was not to resume the grant but to effectuate the intention of the grantor by preserving the property to the uses for which it was dedicated to the public.

(2) The plaintiff was not entitled to a declaration of an absolute proprietary title in the ghat, as the same had been dedicated to the public, and the plaintiff had only the right of reversion if ever the ghat ceased to be used as such.

(3) The defendants were not entitled to exclusive possession over specific portions of the ghat and to place *takhts* and canopies over them by fixing poles in the pavement by digging holes in it. The right claimed by them was not capable of being

\*First Appeal No. 558 of 1930, from a decree of J. N. Kaul, Additional Subordinate Judge of Benares, dated the 25th of June, 1930.

acquired by prescription or under a lost grant inasmuch as the ghat having been dedicated to the public, the defendants could not have acquired any right under any grant or prescription which might interfere with or limit or obstruct the rights of the public. The putting up of *takhts*, canopies, etc. by way of exclusive possession was a serious interference with and restriction of the rights of the public who were entitled to the use of the whole of the ghat. Where land has been dedicated to the public, no one can by invasion, however prolonged, gain for himself a title to the land or to the exclusive user of the land. So far as a grant is concerned, in the case of property which has been dedicated no person can make a valid grant affecting or interfering with the rights of the public. Again, the right set up by the defendants could not be a customary right of the ghatias as a class, for then the claim of exclusive possession of the defendants would militate against the rights of the other ghatias; moreover, the evidence showed that the other ghatias occupying this ghat and other ghats did so by leave and license of the builders of the ghats, so that ghatias were only licensees.

(4) But although the defendants had no right of exclusive possession over any portion of the ghat or to put any *takhts*, canopies, etc. thereupon, they as members of the public had a right to enter upon the ghat and to use it; and the plaintiff had no right to interfere with the right of the public of being served by the ghatias or with the defendants' receiving alms or gifts for their services from the public. The plaintiff was not entitled to any decree of ejectment of the defendants from the ghat or to any injunction against them preventing them from acting as ghatias on the ghat.

Messrs. *P. L. Banerji* and *A. Sanyal*, for the appellants.

Drs. *S. N. Sen* and *K. N. Katju* and Messrs. *H. K. Mukerji*, *D. P. Malaviya* and *A. M. Gupta*, for the respondent.

SULAIMAN, C.J., BAJPAI and GANGA NATH, JJ.:—This is a defendants' appeal and arises out of a suit brought against them by the plaintiff respondent. The ghat known as Prayag Ghat in mohalla Dasaswamedh, Benares city, was built by the ancestors of the plaintiff and the plaintiff recently repaired the same. The

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plaintiff's case was that the said ghat was her property, that she and her predecessors in title had been in peaceful possession as proprietors and that she had been exercising all the proprietary rights over the same. The defendants who are known as "ghatias" had been sitting in different seasons on different portions of the said ghat with her leave and license for earning their livelihood with alms and gifts from the Hindu pilgrims who came to bathe at the said ghat. The defendants have cut holes on the stairs and pavements and fixed bamboos on them and constructed fire-hearths on the ghat and have thereby been damaging and injuring the plaintiff's ghat. They have proved themselves to be a nuisance and have been causing damage to the plaintiff's ghat. The defendants are mere squatters. They have no right to sit on any portion of the plaintiff's ghat as ghatias without her consent. The plaintiff therefore prayed for:—(1) a declaration that she was the owner of the Prayag Ghat and the defendants had no right to sit on any portion of the said ghat as ghatias in any season of the year; (2) a decree in her favour ordering ejectment of the defendants from the said Prayag Ghat, and for removal of the railings from pier "A" and of planks, fire-hearths, earth-mounds, canopies, bamboo poles and any other articles and obstructions which may be found to have been placed by the defendants on any part of the said ghat; and (3) a permanent injunction against the defendants, restraining them from using any portion of the said Prayag Ghat as ghatias in any season of the year and from sitting and squatting over the same for the purpose of collecting "*dan dakshina*" from the bathers.

The appellants defendants contended that they belonged to the community of ghatias who were settled in the holy city of Benares from thousands of years and whose business and duty was to assist the pilgrims at the time of their bathing in the Ganges and in the proper performance of their religious ceremonies at the

bank of the holy river Ganges. The Hindus, they said, built ghats on the sacred river for the convenience of the pilgrims. Such ghats were dedicated for the benefit of the Hindu community at large. It was absolutely necessary that the person building the ghat should grant a right to some members of the ghatia community, or allow them to acquire such right by prescription, of occupying definite portions of the said ghat by the use of *chaukis* or *takhts* for the purpose of user by the pilgrims for the performance of the *puja* and other religious ceremonies. They (defendants) have been in occupation and possession of definite sites in the Dasaswamedh Prayag Ghat from the time of their ancestors for hundreds of years. They had acquired a right, either by grant (the origin of which was now lost) or by prescription or by custom as described above, to occupy the sites of the ghats in the usual manner by laying out *chaukis* and *takhts* and removing the same up and down as the river advanced or receded, from the time of their ancestors. The plaintiff cannot deprive them of this right and they were not liable for ejectment. The defendants also contended that the plaintiff was not competent to maintain the suit.

The trial court decreed the suit. It found that the ghat had been dedicated to the use of the public but the dedication did not in any way affect the proprietary right and did not vest the ownership of the soil in the public who had only got a right of user and the plaintiff retained her ownership of the soil and had a right of suit. The defendants had no legal rights against the owner and were liable for ejectment.

The appeal originally came up for hearing before a Bench of two learned Judges, who in view of the observations made in Second Appeal No. 286 of 1931, referred the case to the Full Bench. In Second Appeal No. 286 of 1931 the question whether the ghatia does acquire a right of property by long user of the ghat was not decided and it was observed by the learned Judges

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that if it had been necessary to decide the question as to whether the right claimed by a ghatia as against the owner of the ghat was a right of property, they would have felt bound to refer the matter to a Full Bench.

It is not in dispute that the land of the ghat was purchased and a masonry ghat built by the predecessor in title of the plaintiff. The ghat has been dedicated to the public and the public has been using the ghat for generations since it was built. It is also a matter of agreement that the defendants and their predecessors have sat on different portions of the ghat for generations and taken alms and gifts from the public who used the ghat and have assisted the public at the ghat in the performance of their religious rites. The defendants do not claim any right to the ghat by virtue of adverse possession.

Out of the two plots on which the ghat has been built, one was purchased by Raja Jagan Narayan from Bhawani Singh under a sale deed dated the 28th of Safar, 1229 Hijri and another by his son, Raja Bishun Indar Narayan under a sale deed dated the 15th of October, 1818. The land has been described as plots of land of the zamindari of the vendors. The masonry ghat was built after these purchases. The ghat, as already stated, has been dedicated to the public which has been using it since its construction. No deed of endowment is forthcoming which may show what rights, if any, were reserved by the plaintiff's predecessors who built and dedicated it. The plaintiff's rights have therefore to be judged from the nature and character of the connection the plaintiff and her predecessors in title have had with it. No trustee or manager has ever been appointed to look after the ghat on behalf of the public. The plaintiff and her predecessors have been looking after and maintaining it. They have repaired it from time to time when it fell into disrepair. The Municipal Board, Benares, called upon the plain-



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tiff several times to do necessary repairs. In July, 1908, the Municipal Board sent a notice to the plaintiff to construct a staircase to remove the inconvenience of the public. On the 20th of January, 1913, a notice was sent to the plaintiff by the Municipal Board to complete the stone pavement of the ghat and remove the silt. In April, 1913, the Municipal Board again sent a notice to the plaintiff to remove earth heaped on the ghat. The sanitation department also called upon the plaintiff from time to time to remove sand and earth deposited on the ghat (vide notice, dated the 2nd of December, 1916, and notice dated the 27th of February, 1918). If the plaintiff had no connection left with the ghat, she would not have been asked to do all these acts.

There is evidence on the record to show that the plaintiff has been realising "*jharis*" from the shopkeepers keeping shops on the ghat on festivals. The "*jharis*" (toll) realised by the plaintiff from the shopkeepers has been entered in the account books maintained by the plaintiff. The witnesses have also deposed that it was realised by her.- The plaintiff has produced account books from 1276 B.S. till 1334 showing the income and expenditure relating to this ghat. The "*jharis*" (toll) realised by the plaintiff from the hawkers who sit on the ghat has been entered in the account books, extracts of which have been proved by the evidence of Jogendra Nath Mukerji, plaintiff's mukhtar-i-am.

The ghat having been dedicated to the public, it is not conceivable that the plaintiff or her predecessors could have ever wished to appropriate its income to their private use, nor has the plaintiff made any attempt to show that its income was ever appropriated by her or her predecessors. It therefore appears that the plaintiff and her predecessors realised the income of the ghat and made repairs as a manager or mutwalli and not as an absolute proprietor.



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The evidence produced by both sides shows that practically the whole of the ghat has been occupied by the *takhts* placed by the defendants and other ghatias. Hardly a space of more than 4 feet has been left between the *takhts* for the passage of pilgrims and their access to the ghat. It is also proved by the evidence that the defendants have put up canopies and railings by digging holes in the pavements. The holes dug in the pavement covered by water are not only injurious to the pavement itself but are dangerous to the public as well, as any person may injure his foot which may fall in the hole. The defendants by placing their *takhts* have been doing acts which interfere with the rights of the public. If the defendants' *takhts* are left where they are, the public would be excluded from the space occupied by the *takhts*.

There being no other manager or mutwalli of the ghat, the plaintiff as heir of the original donor is entitled to maintain the present suit, the object of which is not to resume the grant but to effectuate the intention of the grantor by preserving the property to the uses for which he dedicated it to the public.

The plaintiff is not entitled to a declaration of an absolute proprietary title in the ghat, as the same has been dedicated to the public, and the plaintiff has only the right of reversion if ever the ghat ceases to be used as such. She or her successors in title can neither revoke the dedication nor do any act on the ground which would cause obstruction to the public in their use of the ghat.

As regards the defendants' right, they claim a right of exclusive possession over specific plots of land and to place their wooden platforms (*takhts*) and canopies thereon by digging holes in the pavements and to minister to the needs of the bathing public and receive alms and gifts from them in remuneration of the services which they may render to the bathing public.

They have not been able to define the nature and character of the right claimed by them. Sometimes they stated that they were claiming a personal right to do all these acts and sometimes they said that it was a customary right which belonged to the ghatias. The right claimed by the defendants may be divided into two parts, namely (1) a right to exclusive possession over specific plots of land and to place wooden platforms and canopies over them by fixing poles in the pavement by digging holes in it, and (2) the right to minister to the needs of the bathing public and to receive alms and gifts from it in consideration of the services to be rendered by them.

The first part cannot be claimed by the defendants under any customary right pertaining to the ghatias because the right claimed by the defendants for their exclusive possession militates against the rights of the ghatias as a class inasmuch as the other ghatias would be excluded from the land over which the defendants claim a right to exclusive possession. If it had been a customary right each and every member of the ghatia class without exception would be entitled to use every inch of the land and no ghatia would be entitled to exclude another ghatia from any specified portion of the ghat.

There is evidence on the record which leaves no room for doubt that ghatias have no customary right. They have been sitting at other ghats with the leave and license of the owners of the ghats or the persons under whose management the ghats are. They have no right to occupy any specific portion of the ghat without the permission of the owner. There are several ghats which belong to Bundi State, Maharana of Udaipur and Jaipur State. Ghatias have been sitting on them. The evidence of Bans Narain Singh who is the agent of the Bundi State proves that there are two ghatias who sit on the ghats of the Bundi State with the permission of the State. Prem Nath who is in charge of the ghat

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belonging to the Maharana of Udaipur and is himself a ghatia has also stated to the same effect. He has deposed that ghatias have no right to sit at the ghats without the permission of the owners of the ghat. Harnam Prasad who is in charge of the ghat of the Jaipur State has also deposed that three ghatias sit at the ghat of the Jaipur State with the permission of the Jaipur Durbar and the ghatias have otherwise no right to sit at the ghat.

As already stated, a dispute arose in connection with this ghat in 1917 between the plaintiff and two other ghatias, Baiju ghatia and Ramu ghatia. It was held that the ghatias had not acquired any right of user by prescriptive right or a right of easement or customary right to use the ghat in the manner in which they had done in the past except with the leave and license of the plaintiff; vide *Ramu Ghatia v. Rani Hemanta Kumari* (1).

In this connection it is also very significant that the other ghatias have executed agreements to the plaintiff and obtained her permission to sit at the ghat in dispute. If the ghatias had any customary right, they would not have done so. So the first part of the right claimed by the defendants cannot be established under any customary right.

As regards its being a personal right, the defendants claim it by prescription or by a lost grant as is stated by them in paragraph No. 10 of their written statement which is as follows: "That the defendants have acquired a right either by a grant (the origin of which is now lost) or by prescription or by custom as described, a right to occupy the sites of the ghats in the usual manner by laying out *chaukis* and *takhts* and removing the same up and down as the river rises or falls, from the time of their ancestors, and the plaintiff, even if she be the owner of the ghat, cannot deprive the defendants of this right."

(1) (1921) 19 A.L.J., 783.

In order to acquire a right by prescription or under a lost grant, it is necessary to show (1) that the origin of the right was legal, (2) that the right had been enjoyed openly, peaceably and uninterruptedly and (3) that the right was valid and enforceable against all.

The ghat having been dedicated to the public, the defendants could not have acquired any right under any grant or prescription which might interfere with or limit the rights of the public. As already stated, there is no difference in principle between the dedication of a ghat to the public and the dedication of a highroad. In the case of a highway dedicated to the public, no person can by occupation or by user of any part of it establish a right as against the public over any part of the land even had it never been used for the purpose for which it was dedicated. As held in *Turner v. Ringwood Highway Board* (1) the dedication to the public cannot be limited by invasion of any of the members of the public nor can they by such invasion, however prolonged, gain for themselves a title to the land or to the exclusive user of the land which was the subject of the invasion. The reason for this is clear. The user by them was a licensed user; they had a right to be there but their right of user could carry with it no right to exclude other persons. Similarly here the ghat was open to the public and the defendants as members of the public had a right to be at the ghat under the dedication and their right of user could carry with it no right to exclude other persons for whose use the ghat had been originally dedicated. So the defendants could not acquire any right by prescription or under any grant which could be valid and enforceable against the public.

In order to have a lawful origin under a grant, it is essential that there should be a capable grantor and a capable grantee. In the case of property which has been dedicated, no person can make a grant affecting or

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(1) (1870) L.R., 9 Eq., 418.

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interfering with the rights of the public. If no right can be granted by any grant now, it could not have been granted in the past by any grant.

It was argued that the defendants might have been given a grant before the dedication. Apparently there appears no reason as to why any person dedicating his property to the public use would make any grant in favour of any single individual which may restrict the rights of the public. In the absence of any deed of grant, the only test to ascertain whether any grant was made in favour of any individual before dedication to the public is the manner in which the respective rights, if any, of the person who claims any right under the grant and of the public were exercised and enforced against each other. If dedication to the public is made subject to any grant in favour of any individual, his rights would have preference over the rights of the public and the public would exercise its rights subject to the rights given to any person under any grant. If the defendants had been granted any right of exclusive possession over any specified piece of land by placing their platforms, they or their predecessors would not have been ejected at any time nor their platforms removed. But we find that soon after the construction of the ghat the plaintiff's predecessors in title took action against the ghatias and on their complaint to the authorities the chabutras of the ghatias were removed and the ghatias were bound over to be of good behaviour in 1829, 1839 and 1840. If there had been any grant before the dedication in their favour, it must have been much more fresh in 1829, 1839 and 1840 than it is now, and the defendants should have been able to enforce their rights under it. But the very fact that the defendants could not do so shows the futility of their contention that a grant might have been made to them before the dedication. In 1914 when the repairs were made by the plaintiff, the ghatias were

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removed from the ghat. That the public rights have always been paramount is proved by the fact that the *takhts* of the ghatias were removed whenever they interfered with the rights of the public or the public needed the whole of the ghat for its use. Mr. N. N. Banerji, a witness for the plaintiff, who has been working as the Captain of the Bengali Tola Sewa Sangh for the last ten years, has deposed that the defendants' *takhts* used to be removed at first through the police under the orders of the District Magistrate and now the defendants remove them themselves when asked to do so. His evidence is supported by that of Mangla Prasad Singh, a witness for the defendants. Mangla Prasad Singh deposes that the ghatias' *takhts* are removed on the occasion of eclipses. It is only on the occasions of eclipses or festivals that the public goes to the ghat in a large number and needs the whole of the ghat for its use. On such occasions the defendants' *takhts* have always been removed. The defendants have not been able to show any single instance in which they exercised or enforced their rights against the public. All these facts leave no room for doubt that no grant was made in favour of the defendants before the ghat was dedicated to the public and the defendants have acquired no right which may affect, restrict or interfere with the rights of the public. As already stated, the right of exclusive possession by placing *takhts* as claimed by the defendants is bound to interfere with and restrict the rights of the public. The whole of the ghat has been occupied by the *takhts* and hardly a space of a few feet has been left open and available to the public.

If the defendants had any right to occupy any specific piece of land and to place *takhts* thereon, they should have appropriated the income derived from toll realised from hawkers who sit on the *takhts* or platforms on the occasion of eclipses or fairs. But it was never done so. As stated above, it is the plaintiff who has

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been realising "*jharis*" (toll) from the hawkers. The fact also negatives the right claimed by the defendants.

It is thus clear that the right claimed by the defendants has not been enjoyed by them openly, peaceably and uninterruptedly and it is not such as may be enforceable against all; nor could its origin have been legal.

As regards the second part of the right, namely the right to minister to the needs of the bathing public and to receive alms and gifts from it in consideration of the services to be rendered by them, there can be no doubt that the bathing public has a right to go to the ghat to bathe and perform spiritual ablutions and to take to the ghat persons who may help it in proper performance of spiritual ablutions and accompanying ceremonies. The defendants and other ghatias have been ministering to the needs of the bathing public and helping it not only in the proper performance of the ablutions and ceremonies but also in different other manners. The plaintiff has no right to interfere with the right of the public of being served by the ghatias. The ghatias themselves as members of the public also have a right to enter upon the ghat and to use it. In stopping the defendants from going to the ghat to minister to the needs of the bathing public, the plaintiff would be interfering with the rights of the bathing public which it has under the dedication and has enjoyed ever since the construction and dedication of the ghat. The plaintiff has no right to interfere with the defendants' receiving alms or gifts from the public which the public may give to the defendants in remuneration of their services. The matter of receiving alms or gifts does not interfere in any way with the rights of the plaintiff in respect of the ghat. It is a matter purely personal between the public and the defendants, and so long as the defendants do not do any act which may amount to or cause nuisance at the



ghat, the plaintiff has no right to interfere with the defendants. The plaintiff is therefore not entitled to any injunction against the defendants preventing them from acting as ghatias on the ghat and in the course of attending to the pilgrims either standing on the ghat, remaining there or sitting at the ghat, or to any decree of ejectment against them. But the defendants, as already stated, have no right of exclusive possession over any portion of the ghat or to put any *takhts* and fix canopies or railings by digging holes in the pavements.

As already stated, plaintiff is not the absolute owner of the ghat and is not entitled to a declaration of an absolute proprietary title in the ghat. The plaintiff is entitled only to a decree for removal of the railings from pier "A" and of planks, fire-hearths, earth-mounds, canopies, bamboo poles and any other articles and obstructions which may be found to have been placed by the defendants on any part of the said ghat, but not to a decree of ejectment against the defendants or to any permanent injunction restraining them from using the ghat as ghatias or sitting on the ghat while carrying on their profession of ghatias, and we order accordingly. Parties will bear their own costs throughout.

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## APPELLATE CIVIL

*Before Mr. Justice Collister and Mr. Justice Bajpai*

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GANESHJI PANDE AND OTHERS (APPLICANTS) *v.* BHAGIRATHI AND ANOTHER (OPPOSITE PARTIES)\*

*Guardians and Wards Act (VIII of 1890), section 7—Guardian appointed by will—Probate not obtained—Application for certificate of guardianship—Whether maintainable.*

Where a person has been appointed guardian of a minor under a will, it is not necessary for him to take out probate of the will as a condition precedent to the maintainability of an application by him under the Guardians and Wards Act to be appointed guardian of the minor, and the court must consider and decide the application on the merits.

Mr. A. Sanyal, for the appellants.

Mr. B. Malik, for the respondents.

COLLISTER and BAJPAI, JJ.:—This is an appeal from an order which has been passed by the District Judge of Benares in respect to an application for guardianship.

One Pandit Devi Prasad died on the 25th of June, 1931, leaving a minor son by name Sita Ram. On the 19th of May, 1931, Pandit Devi Prasad had executed a will and it is said that under that will he appointed the four persons hereinafter named as the guardians of Sita Ram: (1) Ganeshji Pande, (2) Devi Pande, (3) Bish Nath and (4) Suraj Prasad Pathak.

Suraj Prasad Pathak is dead; but the other three abovenamed persons applied to the District Judge for their appointment as guardians of Sita Ram on the basis of Pandit Devi Prasad's will dated the 19th of May, 1931. The application was opposed by Mst. Bhagirathi, who was the sister of Sita Ram; and her husband Trilochan put in an application before the court for his own appointment as guardian. Mst. Bhagirathi is now dead and learned counsel for Trilochan informs us that his client has no longer any interest in this matter.

\*First Appeal No. 145 of 1934, from an order of L. V. Ardagh, District Judge of Benares, dated the 14th of July, 1934.

The District Judge did not go into the merits of the application of Ganeshji Pande, Devi Pande and Bish Nath, but has dismissed their application *in limine* on the ground that it could not be entertained unless and until probate of the will was obtained. In *Pathan Atikhan Badlukhan v. Bai Panibai* (1) a Bench of the Bombay High Court held that it is not incumbent on a person who has been appointed guardian of a minor under a will to take out probate as a condition precedent to his obtaining a certificate of guardianship under Act VIII of 1890. That decision was followed by a Bench of the Calcutta High Court in *Sarala Sundari Debi v. Hazari Dasi Debi* (2), where it was held that in an application for the appointment of a guardian of a minor the court is bound to consider a will although probate has not been granted. The judgment contains the following observation: "The fact that there is a contest as to the validity of the will may induce the court to exercise its discretion one way or the other, as for instance it may probably defer deciding on the question of guardianship until the question of probate has been determined. But it is not open to the court to say that it will refuse to take notice of the will." It is not suggested before us that there is any contest as regards the validity of Pandit Devi Prasad's will, and we can find nothing in the Act to justify the view which the learned Judge of the court below has taken. There is no reported authority of this Court on the subject; but we are in full agreement with the view which has been expressed by the Bombay High Court and the Calcutta High Court in the cases above referred to and we accordingly allow this appeal and set aside the order of the court below and we remand the case to that court for inquiry and decision according to law in the light of the observations which we have made above.

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(1) (1894) I.L.R., 19 Bom., 832. (2) (1915) I.L.R., 42 Cal., 953.

*Before Sir Shah Muhammad Sulaiman, Chief Justice,  
and Mr. Justice Bennet*

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LATAFAT HUSAIN AND OTHERS (PLAINTIFFS) *v.* HIDAYAT  
HUSAIN AND OTHERS (DEFENDANTS)\*

*Muhammadian law—Relinquishment of future right of inheritance—Validity—Relinquishment in lieu of gift in praesenti of other property—Family settlement—Estoppel—Contract not to claim a future inheritance—Transfer of Property Act (IV of 1882), section 6(a).*

Under the Muhammadan law a relinquishment or renunciation of a future right of inheritance is not in itself valid so as to be binding upon the maker in the sense that the estate passes to the person in whose favour the relinquishment is made.

But an expectant heir may have so acted as to estop himself from claiming the inheritance when it falls due. The question of estoppel is a question under the Contract Act and the Evidence Act, and not one strictly under the Muhammadan law. If the relinquishment is not in the nature of a gift or transfer of a contingent right, but is merely a contract for not claiming a contingent right of inheritance when succession opens in future, then the case would not be affected by section 6(a) of the Transfer of Property Act; such a contract, made for consideration, by an expectant heir is not in any way illegal. It would, of course, be a matter of discretion for the court to enforce or to refuse specific performance of such a contract. In cases where the agreement has been effected not for a monetary consideration merely, but in a form which makes it impossible for the court to grant adequate compensation to the aggrieved party, the agreement may well be enforced and the heir be held bound by it.

So, where two documents of even date were executed, one being a deed of wakf of a part of his property by a Muhammadan in favour of his second wife by which he appointed her as the mutwalli and made her sons the beneficiaries, and the other being a deed by which the wife relinquished her dower as well as her claim to any future inheritance in the rest of the estate of her husband; and during the life time of the husband possession was obtained and enjoyed by her of the wakf property; and after the husband's death she sued for a

\*Second Appeal No. 1337 of 1932, from a decree of Maheshwar Prasad, Subordinate Judge of Allahabad, dated the 14th of July, 1932, confirming a decree of J. K. Dar, Munsif of West Allahabad, dated the 7th of April, 1931.

share by way of inheritance in the estate of her husband: It was *held* that the plaintiff could not be allowed to go back upon her relinquishment which was part of a family settlement between the husband and the wife, binding on the parties. Under the family settlement the plaintiff had been in possession of the wakf property for several years, and she could not now be allowed to resile from her previous position and claim the inheritance, as it was not possible to grant her such relief by making her pay adequate compensation to the defendants.

Messrs. *K. Verma, Zafar Mehdi and Hyder Mehdi*, for the appellants.

Mr. *Mahbub Alam*, for the respondents.

SULAIMAN, C.J., and BENNET, J.:—This is a plaintiff's appeal arising out of a suit for recovery of possession of a one-eighth share in the inheritance of the plaintiff's deceased husband, Fasahat Husain. Originally Fasahat Husain and his brother, Tahawar Husain, were entitled to equal shares in some property; and Tahawar Husain died, his estate devolving on his mother, Mst. Sanjha Bibi, under the Shia law. Mst. Sanjha Bibi gifted this property to Fasahat Husain's son from his first wife in 1894. On the 6th of November, 1920, two documents were executed; one was a deed of wakf by Fasahat Husain under which he appointed his second wife, the present plaintiff, Shafiq-un-nissa, as the mutwalli, and constituted the children of Shafiq-un-nissa as the beneficiaries; and the second was a deed of release executed by Shafiq-un-nissa under which she relinquished her claim to her dower against the property of her husband, and also relinquished her claim to any inheritance in the estate reserved by him. Fasahat Husain died in 1928. Thereupon, contrary to the release made by Shafiq-un-nissa, she brought the present suit to recover her one-eighth share in the inheritance of Fasahat Husain. She has not pressed her claim for her dower. The only question that arose for consideration was whether Shafiq-un-nissa could obtain a decree for possession of the one-eighth share in the estate left by Fasahat Husain when she had in his life time

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renounced her claim to such inheritance. Both the courts below have dismissed the claim. In appeal it is contended before us that a relinquishment of the right of succession made by a Muhammadan heir is prohibited by the Muhammadan law and is null and void, and cannot stand in the way of the plaintiff when seeking to recover her share of inheritance.

It seems to us that the question raised in appeal really consists of two parts which are distinct and separate from each other. The first is whether a relinquishment of the right to succession made by a Muhammadan heir is valid in law so as to be binding upon him in the sense that the estate passes to the person in whose favour the relinquishment is made. The second is whether, even if the relinquishment is not effective, there can be an estoppel in certain circumstances.

The preponderance of authorities on the first point is in favour of the view that a relinquishment by a Muhammadan heir before the succession has opened is under the Muhammadan law invalid. The point arose in a case decided in 1827 by the Sudder Dewanny Adawlut of Bengal in *Musammaut Khanum Jan v. Musammaut Jan Beebee* (1), which case was quoted as an authoritative pronouncement by Macnaghten in his "Principles and Precedents of Muhammedan Law" (Case No. XI). In that case the two daughters of a Muhammadan lady had renounced their right of inheritance to their mother's property on receipt of Rs.1,000 each from persons in whose favour they had executed the deed. After the death of the mother they waited for nearly twelve years, and then ultimately brought a suit for recovery of their legal shares. The promisees were setting up a deed of gift executed by the mother in their favour, but that was not upheld. The question then arose whether the renouncement was valid and would prevent the daughters from claiming their shares. The Muttā

(1) (1827) 4 S.D.A., (Beng.) 210.

attached to the zilla court of Shahabad came to the conclusion that inasmuch as consideration had been received, the plaintiffs were not entitled to succeed, although the right parted with had not been in existence at the time. But on appeal the Qazi of the provincial court and the Mufti of Patna expressed the opinion that there was no bar to the claim. The Law Officers of the Sudder Dewanny Adawlut declared their opinion in favour of the accuracy of this view. The view was based on the well recognized proposition that during the life time of the mother the daughters had no right of inheritance, and that therefore their renunciation during the mother's life time of their rights of inheritance was null and void, and it amounted to giving up something which had no existence at the time, and that accordingly such act could not invalidate the right of inheritance supervenient to the mother's death, or be any bar to their claim of the estate left by her. The question of estoppel, either in equity or arising under any rule of evidence, does not appear to have been directly referred to the Muftis and the Qazi for their opinion.

So far as the proposition that under the Muhammadan law a renunciation of a future right of inheritance is not in itself valid is concerned, this authority has remained unchallenged, and has been adopted by the various text-book writers.

We may mention that two later cases decided by their Lordships of the Privy Council do not really negative this proposition. In the case of *Musammat Hurmut-ool-Nissa Begum v. Allahdia Khan* (1) there had been no plea raised by the defendants that any renunciation of a right to succession had been made during the life time of Hydur Ali, the succession to whom was claimed by the plaintiff. The suit was brought after a long number of years, and the mutation of names in favour of the defendants had been

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(1) (1872) 17 W.R., 108.

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acquiesced in. Their Lordships came to the conclusion that the evidence failed to establish that the plaintiffs had any title. In addition their Lordships also remarked that according to Muhammadan law there may be a renunciation of the right to inherit, and that such a renunciation may not be expressed, but may be implied from the ceasing or desisting from prosecuting a claim maintainable against another. As no question of a renunciation in the life time of the ancestor had arisen in that case their Lordships' remark presumably related to a renunciation which could be implied from the conduct of the plaintiff since the death of the ancestor. Similarly in the case of *Muhammad Kamil v. Imtiaz Fatima* (1) Mubarak Ali had died in 1891, and the plaintiff claimed a share in the estate left by Mubarak Ali. The suit was filed in 1903, and in defence it was pleaded that on account of the conduct of the plaintiff in 1895 there had been a renunciation of her share in the inheritance. There was no plea taken that any relinquishment had been effected in the life time of Mubarak Ali. Their Lordships accordingly went into the question of fact whether the plaintiff had relinquished her claim and was estopped from pressing it or not.

In *Kunhi Mamod v. Kunhi Moidin* (2) a Bench of the Madras High Court held that where a person had executed a deed of relinquishment for a consideration of Rs.150 renouncing all his claims to the estate of a Muhammadan lady, the renunciation was binding on the plaintiff and he could not be given a decree. This view was subsequently dissented from by a Full Bench of the Madras High Court in *Asa Beevi v. Karuppan Chetty* (3), where it was held that a transfer or renunciation of a contingent right of inheritance is prohibited under the Muhammadan law. The relinquishment in that case had been made in the life time of the ancestor

(1) (1909) I.L.R., 31 All., 557.

(2) (1896) I.L.R., 19 Mad., 176.

(3) (1917) I.L.R., 41 Mad., 365.



for a cash consideration. The Full Bench allowed the plaintiff to recover possession of the property without calling upon the plaintiff to refund the amount. The Bombay High Court, also, in *Sumsuddin Goolam v. Abdul Husain* (1) has held that the chance of an heir-apparent succeeding to an estate under the Muhammadan law is neither transferable nor releasable, and has further considered that to uphold such a relinquishment would be contrary to the intention of the law (section 6 of the Transfer of Property Act).

So far as the proposition, that under the Muhammadan law a relinquishment by an heir who has no interest in the life time of his ancestor is invalid and void, is concerned, the authorities seem to be all one way. On principle there seems to be no distinction between the rules of English law and the rules of Muhammadan law. Such a release or renunciation cannot be operative so as to divest the heir of all rights in the inheritance when the succession opens and to vest the whole property in the other person in whose favour the relinquishment was made. Inheritance is governed by the personal law of the deceased owner, and the devolution of property is brought about by the operation of law, and does not depend on the will of the heir. But there is nothing to prevent an heir from not claiming a share in the property which has devolved on him, or from so acting as to estop himself from claiming it.

The question of estoppel is really a question arising under the Contract Act and the Evidence Act, and is not a question strictly arising under the Muhammadan law. In *Mohammad Hashmat Ali v. Kaniz Fatima* (2) a Bench of this Court held that there was nothing illegal in a person, for good consideration, contracting not to claim the estate in the event of his becoming entitled to inherit on the decease of a living person; and further held that the provisions of section 6 of the Transfer of

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(1) (1906) I.L.R., 31 Bom., 165.

(2) (1915) 13 A.L.J., 110.



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Property Act did not in any way create a bar against the legality of such a contract. The same view was expressed in the case of *Barati Lal v. Salik Ram* (1), where a Hindu reversioner had relinquished his right upon receipt of consideration. Obviously section 6 of the Transfer of Property Act cannot in terms apply to such a relinquishment. If the relinquishment is in the nature of a gift or transfer of a contingent right, then of course it would be void under section 6; but if it is merely an agreement or contract for not claiming a contingent right of inheritance when succession opens in future, then the case would not be governed by the provisions of section 6 at all.

The contract made by an heir, for consideration, not to claim a certain property cannot be said to be in any way illegal or forbidden by any law. Of course where the consideration is received and it is only a cash consideration and the contract is subsequently sought to be enforced, it would be a matter of discretion for the court to refuse specific performance and to make the plaintiff heir pay compensation when he is not carrying out his contract. But in cases where the agreement has been effected in a form which makes it impossible for the court to grant adequate compensation to the aggrieved party, the agreement may well be enforced and the plaintiff be held bound by it. It has been held in this Court that contingent reversioners can enter into a contract for consideration which may be held binding on them in case they actually succeed to the estate: See *Mahadeo Prasad v. Mata Prasad* (2) and *Fateh Singh v. Thakur Rukmini Ramanji* (3). It was pointed out in the case of *Moti Shah v. Gandharp Singh* (4) that although a reversionary right cannot be the subject of a transfer, for such a transfer is prohibited by section 6 of the Transfer of Property Act, there was nothing to prevent a reversioner from so acting as to

(1) (1915) I.L.R., 38 All., 107.

(3) (1923) I.L.R., 45 All., 339.

(2) (1921) I.L.R., 44 All., 41.

(4) (1926) I.L.R., 48 All., 637(641)-

estop himself by his own conduct from subsequently claiming a property to which he may succeed. Among other cases reliance was placed on the pronouncement of their Lordships of the Privy Council in the case of *Kanhai Lal v. Brij Lal* (1), where a reversioner was held bound by a compromise to which he was a party.

The finding of the lower appellate court in this case in fact is much stronger. According to the recitals contained in the deed of release executed by the plaintiff it is clear that, as found by the lower appellate court, the plaintiff had herself been insisting that her husband should execute the deed of wakf in her favour in lieu of her desisting from her claim to dower and enforcing her prospective rights as an heiress of her husband's estate. The two deeds were executed at the same time, and, on the finding of the lower appellate court, they formed part and parcel of the same transaction. The husband would not have executed the deed of wakf if the plaintiff had not been willing to forego her claim to the inheritance and willing to abandon her claim to the dower. Now that the husband is dead and the deed of wakf has been accepted by the plaintiff and she is the mutwalli in possession of the wakf property, she should not be allowed to resile from her previous position and claim a share in the inheritance which she had abandoned. This would be allowing her to commit a fraud on the deceased who would not have executed the deed of wakf if she had not been agreeable to relinquish her claim. The learned Judge has come to the conclusion that the arrangement between the husband and the wife was in the nature of a family settlement which is binding on the plaintiff. We think that on this finding the plaintiff cannot be allowed to go back upon her renunciation as it is not possible to grant her relief for possession by making her pay compensation to the defendants. The case of *Nasir-ul-Haq v. Faiyaz-ul-Rahman* (2) may be distinguishable, on the ground that in that case the

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(1) (1918) I.L.R., 40 All., 487.

(2) (1911) I.L.R., 33 All., 457.

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Bench did not expressly decide the question of the validity of the relinquishment under the Muhammadan law, and proceeded merely on the ground that under the arrangements the husband and wife had taken life estates and the remainder had been settled on the children of the marriage; but the cases of *Mohammad Hashmat Ali* (1) and *Barati Lal* (2) are in point, especially the latter, which proceeded on the ground that there had been a family settlement of the disputed claim. The plaintiff and her children were not entitled to obtain immediate possession of the wakf property without the wakf, which they succeeded in obtaining, and had remained in possession of the same for about eight years before the husband died. She cannot be allowed now to go back upon the family settlement which, if not enforced, would cause injustice to the defendants, who would suffer. Accordingly we dismiss the appeal with costs.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and  
Mr. Justice Bennet

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January, 17

NAWAB SINGH (PLAINTIFF) v. DALJIT SINGH (DEFENDANT)\*

*Benami transaction—Fraudulent sale deed—Joint fraud—Fictitious sale for defeating right of pre-emption—Fraud accomplished—Subsequent suit on basis of fictitious deed—Parties in pari delicto—Defendant entitled to plead joint fraud and show the true character of the sale deed—Position of heirs of original parties.*

*D*, the purchaser of certain property, was not a co-sharer in the mahal, and apprehending that a suit for pre-emption might be brought, executed a fictitious sale deed of the property in favour of *G*, who was a co-sharer; both parties knowingly joining together in the fraud. Possession of the property remained with *D*. A suit for pre-emption was actually brought but it was dismissed on the ground that the property had passed to a co-sharer; and the fraud was fully accomplished. Subsequently a suit for possession of the property was brought by *G*'s heir against *D* on the basis of the sale deed; and the

\*Appeal No. 49 of 1935, under section 10 of the Letters Patent.

(1) (1915) 13 A.L.J., 110.

(2) (1915) I.L.R., 38 All., 107.

principal question was whether *D*, being *in pari delicto* with *G*, was precluded from pleading the joint fraud and showing the true character of the fictitious transaction by which no title had passed.

*Held* that the defendant was not precluded from showing the true nature of the sale deed, involving the joint fraud of both the parties; the defendant was not relying upon the sale deed, nor seeking any relief; it was the plaintiff who was relying upon and seeking to enforce the deed, and in such cases the defendant was entitled to give evidence of the real nature and circumstances under which the document came into existence, including the particulars of a joint fraud of the parties which might be alleged by him.

Any person who comes to seek relief from a court of law should not be a party to a fraud, and if both parties are *in pari delicto* the court should decline to help either party who seeks relief and let things remain as they are and let the parties reap the consequences of their own fraud and dishonesty. The plaintiff sought to obtain relief from the court on the basis of the fraudulent transaction; and if the court were to decree his claim, it would not only be upholding the fraudulent sale deed as a valid document but would be carrying the fraud farther still by giving the plaintiff possession of the property which he had not obtained under that fraudulent transaction.

The present suit was brought, not by the original fictitious vendee himself, but by his heir; but there was no reason why the plaintiff, who was an heir and not a *bona fide* transferee for value, should be in any better position than the original vendee himself and be given a decree which should have been refused to the latter.

M<sup>r</sup>. R. C. Ghatak, for the appellant.

Messrs. S. B. Johari and Munir Alam, for the respondent.

SULAIMAN, C.J., and BENNET, J.:—This is a plaintiff's appeal arising out of a suit for recovery of possession brought by Nawab Singh against the defendant Daljit Singh on the basis of a registered sale deed dated the 21st of April, 1921, executed by Daljit Singh in favour of one Gajraj Singh, who was the uncle of the present plaintiff Nawab Singh. The defendant pleaded that the document did not represent a genuine transaction but was a fictitious one and no title under it had

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passed to Gajraj Singh. He supported this plea by alleging that previously one Mst. Phul Kunwar had sold this property to Daljit Singh, who was not a co-sharer in the village, and that there was an apprehension of a suit for pre-emption and in order to defeat the claim for pre-emption Daljit Singh fictitiously executed the sale deed in favour of Gajraj Singh, who was a co-sharer. It has been found that a pre-emptor, Narain Singh, actually instituted a suit for pre-emption on the 21st of June, 1921, against the vendee Gajraj Singh, presumably impleading Daljit Singh also, and the suit was dismissed on the ground that the property had passed to a co-sharer and was no longer liable to be pre-empted. Thus the alleged fraud actually succeeded. It appears however that Gajraj Singh did not succeed in getting mutation of names effected, as previous to him Daljit had not got his own name mutated. Daljit Singh, however, later on got his name mutated on the strength of the previous sale deed, dated the 28th of June, 1920. It is an admitted fact in this case that Daljit Singh is in possession of the property, whereas the plaintiff No. 1 is not.

The court of first instance held that the sale deed did not represent a fictitious transaction and decreed the claim. The appellate court has however come to the conclusion that it was a fictitious document and had been executed fraudulently in order to defeat the claim of Narain Singh pre-emptor and that the fraud was committed by Daljit Singh and Gajraj Singh jointly and that the fraud actually succeeded. The court declined to help the plaintiff and dismissed the suit. On appeal a learned Judge of this Court has affirmed the decree, holding that the plaintiff is not entitled to any relief from a court of law when the person from whom he has derived a title was a party to the fraud.

If Daljit Singh had come to court seeking some relief against Nawab Singh, then even if it had been found that the transaction was a fictitious one we would have

certainly declined to grant any relief to Daljit Singh when the fraud committed by him had actually succeeded. The question that arises in this case is the converse one, namely whether Nawab Singh can be given some relief against Daljit Singh who is in possession; that is to say, whether Daljit Singh can be prevented from exposing the true nature of the transaction and showing that the sale deed was fraudulently executed and that Gajraj Singh was a party to that fraud.

There is some conflict of opinion on this point in India. In the case of *Sidlingappa v. Hirasa* (1) the owner of a property had executed a benami sale deed and the benamidar had sold the property to the plaintiff's father and the attachment of that property was successfully resisted on the strength of that benami transaction against a creditor; the court held that the defendant owner could not be allowed to set up his own fraud when the plaintiff brought a suit to claim possession of the immovable property, and the court decreed the plaintiff's claim for possession, holding that he was entitled to succeed. This case was followed by a Bench of the Madras High Court in *Vodiana Kamayya v. Gudisa Mamayya* (2), where a person who had conveyed property benami to another for the purpose of effecting a fraud on his creditors was not allowed, where the fraud had been effected, to set up the benami character of the transaction by way of defence in a suit by the transferee for possession under the conveyance. A similar view was expressed by a single Judge of the Patna High Court in *Shiva Narain Ram v. Mst. Phuljharia* (3). The learned counsel for the plaintiff also relies on the remark of their Lordships of the Privy Council in *Petherpermal Chet'y v. Muniandy Servai* (4) that the result of the authorities on the subject of the benami transactions had been correctly stated in Mayne's Hindu Law, seventh edition, paragraph 446, page 595. In the case

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(1) (1907) I.L.R., 31 Bom., 405.  
(3) (1919) 52 Indian Cases, 402.

(2) (1916) 32 M.L.J., 484.  
(4) (1908) I.L.R., 35 Cal., 551.

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before their Lordships the fraud had not actually been carried out and the plaintiff, the true owner, was allowed to recover possession of the property.

On the other hand, in the case of *Raghupati Chatterjee v. Nrishingha Hori Das* (1) a Bench of the Calcutta High Court after an examination of numerous authorities came to the conclusion that on no principle of justice, equity and good conscience is a transferee, under a fictitious and fraudulent conveyance never intended to pass title and executed without consideration to defraud the creditors of the transferor, entitled to recover from the transferor possession of the property through the court, if the fraudulent purpose has in fact been accomplished, and that the balance of authority was in favour of the view that in such cases the defendant should be permitted to set up the true transaction. In this Court there is the authority of the ruling in *Vilayat Husain v. Misran* (2), where it was definitely held that once it was established that the parties are *in pari delicto* the courts will not assist the illegal transaction in any respect, that is. the person who asks the court to do something will fail; and that in all cases where the plaintiff is relying on the deed, the defendant is entitled to give evidence of the circumstances under which the document came into existence, and that when these circumstances include an allegation of a general fraud by both plaintiff and defendant, the particulars of that fraud can be pleaded by the defendant, and it is then the duty of the court to look into the matter and if the court comes to the conclusion that the parties were acting together with a view to perpetrating a fraud and did in fact perpetrate the fraud, and that there is no difference in the degree of guilt of the plaintiff and that of the defendant, the duty of the court is not to assist either party. The earlier case of the Bombay High Court was not followed by the Bench but adversely criticised. A Full Bench of the Lahore High Court in

(1) (1922) 71 Indian Cases, 1.

(2) (1923) I.L.R., 45 All., 396.

*Qadir Bakhsh v. Hakam* (1), after a re-examination of the various authorities including the case of *Vilayat Husain v. Misran* (2) decided by this Court, came to the same conclusion and held that in a suit by a benamidar to recover possession of the property from the beneficiary the latter is not precluded from pleading that both parties were *in pari delicto* and thus showing the real nature of the transaction, and that if the fraud had succeeded the plaintiff's claim for possession should be dismissed. The question was argued before their Lordships of the Privy Council in the case of *Ma Ngwe Naing v. Maung Tha Maung* (3). Their Lordships pointed out that there had been various decisions on this point in India which appear to be conflicting, but their Lordships found it unnecessary in that case to decide the point.

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In this state of affairs it is obviously our duty to follow the ruling of this Court, which has now stood for over twelve years, until it is overruled by their Lordships of the Privy Council.

It seems to us that in the present case the defendant is in possession of the property and does not seek any relief from the court at all. It is not necessary for him even to rely on the sale deed in dispute. All that he urges is that his possession should not be disturbed by the court for the benefit of the plaintiff whose predecessor was a party to a fraudulent transaction. There is nothing illegal in a benami transaction in itself. The mere fact that a registered deed stands in favour of the plaintiff's predecessor is not absolutely conclusive, and if the defendant can show that the deed was a fictitious one and no title really passed to the plaintiff's predecessor, the suit must fail. It is the plaintiff who has to rely on this sale deed and he wants to shut out the defendant from exposing the true nature of the transaction and showing that a joint fraud had been intended

(1) (1932) I.L.R., 13 Lah., 713. (2) (1923) I.L.R., 45 All., 396.  
(3) (1928) I.L.R., 7 Ran., 4.



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by the parties to the deed and carried out. The fraud consisted in getting a fictitious sale deed executed and registered, but not in delivering the property to the ostensible vendee. It was therefore a partial fraud that was committed by the parties. What the plaintiff now wants is that the court should help him in completing the fraud and carrying it farther still by not only upholding the sale deed as a valid document but also putting the plaintiff in possession of the property which had been allowed to remain with the defendant. The plaintiff therefore seeks to obtain relief from the court and his claim cannot be decreed unless the court allows itself to be made an instrument to help the plaintiff at the expense of the defendant. Any person who comes to seek relief from a court of law should not be a party to a fraud and if both parties are *in pari delicto* the court should decline to help either party and let things remain as they are and let both parties reap the consequences of their own fraud and dishonesty. There is no reason why the court should help the plaintiff in preference to the defendant and give him what he did not obtain under the fraudulent transaction. The well known principle approved of by their Lordships of the Privy Council, "Let the estate lie where it falls", should apply to such a case and the courts ought not to help either party. Following the ruling in *Vilayat Husain v. Misran* (1), we hold that the view taken by the learned Judge of this Court is correct and that the plaintiff on the findings of the lower appellate court cannot succeed.

Nawab Singh no doubt is not the original party who joined in the fraud but he is an heir of Gajraj Singh. He is not a *bona fide* transferee for value but has acquired the property from Gajraj Singh as an inheritance. There is absolutely no reason why an heir of Gajraj Singh should be in any better position than Gajraj Singh himself, and be allowed to obtain benefit of the fraud committed by Gajraj Singh which Gajraj

(1) (1923) I.L.R., 45 All., 396.

Singh himself was not able to secure, namely possession of the property in dispute.

We accordingly dismiss this appeal with costs.

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### SPECIAL BENCH

*Before Sir Shah Muhammad Sulaiman, Chief Justice,  
Mr. Justice Thom and Mr. Justice Niamat-ullah*

EMPEROR v. GUPTA\*

1936  
January, 20

*Criminal Procedure Code, sections 99A, 99B, 99D—Order proscribing a publication as tending to promote hatred and enmity between different classes—Application to set aside the order—Right to begin—Onus of proof—Intention of author not material—Interpretation—Benefit of doubt—Indian Penal Code, section 153A.*

On an application under section 99B of the Criminal Procedure Code for the setting aside of an order of the Local Government under section 99A proscribing a publication, the initial burden of proof is not on the Crown counsel to support the order of the Government, and the language of section 99B clearly indicates that it is the applicant who has to make out a case in his favour. Accordingly the applicant's counsel should be allowed to open the case, and have the final right of reply.

Section 99D makes it clear that if the High Court is not satisfied that the publication contains matter of the nature referred to in section 99A, it shall set aside the order of forfeiture. It follows that where a passage is open to two interpretations and the matter is in doubt, the Court would not be satisfied that the matter is of the nature mentioned, and must therefore set aside the order of forfeiture.

Intention of the author to promote hatred or enmity between different classes is not a necessary ingredient of the offence under section 153A of the Indian Penal Code. The addition of the words "or is intended to" in section 99A of the Criminal Procedure Code makes the scope of that section wider than that of section 153A, because "intention" falls short of "attempt" and has in addition been made an alternative ground for proceeding under section 99A in cases where the hatred or enmity may not yet have been actually promoted or even attempted, but is intended. The Local Government may

\* Criminal Miscellaneous No. 72 of 1935.

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intervene at an early stage as a preventive measure and stop the actual promotion of hatred etc. These words in section 99A do not make the intention of the author a necessary or material ingredient in cases where the matter comes under section 153A of the Indian Penal Code. Even if a question of intention could arise, such intention must be gathered from the words used, and they themselves would be conclusive; a man must be held to intend the natural consequences of his act.

Where the ethnical origin of a community is sought to be traced by the author of a book, then so long as there is adherence to the historical part of the narrative, however unpalatable it may be to the members of that community, or so long as he is merely relying on certain customs, habits and practices prevailing among that community, there may be no offence under section 153A of the Indian Penal Code. But, on the other hand, where the author uses language which shows malice and attributes to the entire community certain immoral practices and habits, and there is generalisation of offensive remarks on the basis of a few instances and the characterisation of an entire community as possessing certain vices, so as to degrade the members of that community in the eyes of the other classes, the case certainly amounts to promoting feelings of hatred or enmity between classes.

Mr. K. Masud Hasan, for the applicant.

The Government Advocate (Mr. Muhammad Ismail) for the Crown.

SULAIMAN, C.J.:—This is an application by the author of a book, called "*Jat jati ke mukammal halat yani jat darpan*, Part I", under section 99B of the Criminal Procedure Code, for an order to set aside the order passed by the Local Government under section 99A forfeiting to His Majesty all copies of his book.

The first question which arose for consideration was whether the learned counsel for the applicant should open the case, or whether the Government Advocate should begin. That, of course, depends on the further question whether the onus of proof lies on the applicant or on the Government. No doubt the Full Bench in the case of *Emperor v. Baijnath Kedia* (1) were

(1) (1924) I.L.R., 47 All., 298.

inclined to think that having regard to the framework of section 99, the onus is cast upon the Local Government, but added that the question of construction was not free from difficulty, and that the matter was not of any great practical importance. The importance of the question lies in the right to begin and then the final right of reply. The applicant's counsel naturally wishes to have the last word on the point in controversy. In a later case another Full Bench of this Court, in *Emperor v. Kali Charan Sharma* (1), definitely ruled that it is for the applicant to convince the High Court that for the reasons he gives the order of the Local Government is a wrong order. These two views were sought to be reconciled in a third Full Bench of this Court, *Emperor v. Saigal* (2), where it was held that the Bench were in complete agreement with the proposition laid down in *Kedia's* case (3) that the question of onus of proof after both the parties had been fully heard was of little or no practical importance, and considered that it was manifestly most convenient that the Government Advocate should begin and state the case in support of the Local Government's order. The Bench, however, did not expressly endorse the view that the onus of proof lay on the applicant; and, therefore, did not dissent from the ruling of the Full Bench in *Kali Charan Sharma's* case (1).

The language of section 99B is to my mind very clear, and it allows the applicant to have the order set aside by the High Court on the ground that the book in respect of which the Local Government's order was made did not contain any seditious matter, or other matters referred to therein. There is nothing in the framework of the section or its language which would suggest that the initial burden of proof is on the Government and that therefore the Crown counsel must open the case and support the order of the Local Government, and then

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(1) (1927) I.L.R., 49 All., 856. (2) (1930) I.L.R., 52 All., 775.  
(3) (1924) I.L.R., 47 All., 268.

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have the final right of reply. On the other hand the language clearly indicates that it is the applicant who has to make out a case in his favour. The importance of the question lies not only in the circumstance that there would be a right to have the last word in the matter, but also in that the applicant's counsel may open the case and may try to show that the intention of the author was innocent and that the general tenor of the book and the purport of the subject-matter was not intended to promote hatred, enmity, or involve any attack on the religious beliefs and faith of others, but was intended for a laudable purpose. When the translations of objectionable passages are available for the Court, the applicant's counsel can certainly refer to them and satisfy the Court that they do not amount to objectionable matter within the scope of the section. We have accordingly allowed the applicant's counsel to open the case.

The language of section 99B might have created some doubt, but that of section 99D makes it perfectly clear that if the Special Bench is not satisfied that the book contained objectionable matter it shall set aside the order of forfeiture. It would therefore follow that even where a passage is open to two interpretations and the matter is in doubt, the Bench would not be satisfied that the matter is objectionable, and must, therefore, set aside the order of forfeiture. Apparently this was the reason why the Full Bench in *Saigal's* case (1) remarked that where two views of a passage were reasonably possible, the applicant must have the benefit of that which is most favourable to him.

The learned advocate for the applicant has strongly pressed before us that the accused had no intention of promoting hatred or enmity between any two classes of His Majesty's subjects, and has contended that the intention of the author to do so is a necessary ingredient. Now it is quite clear to my mind that there are many

(1) (1930) I.L.R., 52 All., 775.

offences in the Indian Penal Code for which the proof of an express intention on the part of the accused is not at all necessary. Indeed, wherever it is necessary that intention should form a necessary part of the offence the sections expressly say so. No doubt the view has been expressed in Calcutta and Lahore that the true intention of the author will have to be shown before the order can be justified. In *P. K. Chakravarti v. Emperor* (1) the learned CHIEF JUSTICE observed that "It must be the purpose or part of the purpose of the accused to promote such feelings, and, if it is no part of his purpose, the mere circumstance that there may be a tendency is not sufficient." Certain cases were relied upon, which were cases of sedition. That case, however, arose out of proceedings under section 108 of the Criminal Procedure Code where the word "intentionally" has been deliberately introduced by the legislature. In *Ishwari Prasad Sharma v. King-Emperor* (2) another Bench of the Calcutta High Court, although it came to the conclusion that a certain scene in a drama deserved the condemnation of all right thinking men, and if those expressions had stood by themselves and if the article were confined only to that scene they would have had no difficulty in holding that the article came within the purview of section 153A, remarked that the intention of the writer had to be judged not only from the words used in the article but from the article as a whole; and they held that it was not proved that the intention of the writer was to promote feelings of enmity or hatred. The earlier Calcutta High Court cases seem to have been followed in *Lajpat Rai v The Crown* (3), where it was held that the Crown had to establish that the writer of the work had been actuated by that malicious intent which it was necessary to prove by extrinsic evidence, or to infer from the nature of the work itself.

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(1) (1926) I.L.R., 54 Cal., 59(64). (2) A.I.R., 1927 Cal., 747.  
(3) (1928) I.L.R., 9 Lah., 663(666).

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On the other hand the Full Bench in *Emperor v. Kali Charan Sharma* (1), when considering the question as to the intention of the writer, remarked: "If the language is of a nature calculated to produce or to promote feelings of enmity or hatred, the writer must be presumed to intend that which his act was likely to produce."

It seems to me that it would be interpolating the words "with intent to" in section 153A if one were to hold that the intention of the writer must be to promote hatred, etc., and that this must be established. The section merely says: "Whoever by words, either spoken or written, or by signs, or by visible representations, or otherwise, promotes or attempts to promote feelings of enmity or hatred etc." It does not say "intentionally promotes feelings of enmity, etc." The language of this section stands in clear contrast to that of section 499 where it is provided that "Whoever by words either spoken or intended to be read, or by signs or visible representations, makes or publishes any imputation concerning any person *intending* to harm etc." It would, therefore, seem to follow that the legislature contemplates that the words spoken or written, which do promote hatred, etc., would create sufficient mischief so as to fall within the scope of the section, and that it is not necessary for the prosecution further to establish that the writer had the intention to promote such hatred. Even if a question of intention were to arise, such intention must be gathered from the words spoken or written, and they themselves would be conclusive, and it would not be necessary for the prosecution further to prove that such an intention was behind the use of such words.

Coming to the facts of this case, there is no doubt that one of the principal objects of the author was to establish that the Jats are not one of the twice-born classes and are not entitled to wear *janeo* (sacred thread)

(1) (1927) I.L.R., 49 All., 856(860).

and pass as Kshatryas, which according to him they now claim to be. In this connection the author has attempted to trace the previous history of the community and their ethnical origin and has quoted profusely from previous histories and other books, trying to show that Jats could not belong to the upper classes. If he had dealt with the subject from a purely scientific or historical point of view, avoiding all offensive and abusive language, then even if he was wrong in his conclusion, the passages might not be open to objection. Again, even if in support of his theory he were merely relying on certain customs, habits, and practices prevailing among the Jats which are contrary to the practices accepted by the twice-born classes, he may still not be guilty of an offence under section 153A. But where the author of a book goes beyond this and generalises his remarks so as to make them apply to the entire community, and characterises them as low class people and belonging to the criminal classes who are guilty of offences and immoral acts, the book ceases to be a purely historical one and is bound to promote feelings of hatred and enmity between the two classes which are compared.

It is true that in this book the author has not attempted to offend the religious susceptibilities of the Jat community, as presumably he assumes that Jats are Hindus. He has, of course, not attacked their religion. Where a person attacks another religion, or the founder of such religion, there is bound to be a considerable resentment in the community whose religion is attacked, leading to hatred against the community to which the writer belongs. In such cases the offence may well fall within the scope of section 153A. All-doubt on that point has now been removed by the amendment of section 295A of the Indian Penal Code under which insults, or attempts to insult the religion or religious beliefs of a class are made punishable. But where the origin of a community is sought to be traced, then so long as there is adherence to the historical part of the

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narrative, however unpalatable it may be to the members of that community, there may be no offence; but on the other hand where the author uses language which shows malice and is bound to annoy the members of the community the origin of which he is going to trace, and uses remarks which apply to all the present members of that community so as to degrade them in the eyes of the other classes, he would, in my opinion, be promoting feelings of enmity or hatred between that community and the members of his own community, who he intends should entertain a low and poor opinion of that community and regard them as belonging to the low castes.

It would not be proper to quote passages from the book of the author; but there is no doubt that there are several passages even in the portions which have been translated and printed that are wholly obnoxious and highly objectionable, and are intended to attribute to the entire Jat community certain immoral practices and habits which are probably untrue, and which would be highly resented by the Jats. The generalisation of remarks on the basis of a few instances, and the characterisation of an entire community as possessing certain vices are certainly objectionable. I am, therefore, of the opinion that the applicant has entirely failed to show that the book did not contain matters which promoted feelings of enmity and hatred between different classes.

In this connection I would like to add that in section 99A the words "or is intended to" have been added which do not find place in section 153A of the Indian Penal Code. The language of the amendment is unhappy, and might at first sight suggest that a case falling under section 99A must in every case fulfil the requirements of section 153A. The scope of section 99A is wider than that of section 153A, because "intention" falls short of "attempt" and has in addition been made an alternative ground. It seems to me that what was intended was that where the words written or spoken do attempt to promote

feelings of enmity, hatred etc., and therefore fall under section 153A, action can be taken by the Local Government where, although there has yet been no occasion for the promotion of any feelings of enmity and hatred and there may have been no attempt yet made to promote such feelings, but the words are *intended* to promote such feelings. The Local Government may intervene at an early stage as a preventive measure and may stop the actual promotion of hatred etc.

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I would, therefore, dismiss this application.

THOM, J.:—I concur. This Court is entitled to set aside the order of the Local Government only if it is not satisfied that Mr. Gupta's book does contain obnoxious matter within the meaning of section 99A.

Now, it appears to me perfectly plain that Mr. Gupta's book does contain many passages which must be regarded by the Jat community as obnoxious and offensive and which are likely to result in feelings of hatred and enmity between the Jats and other sections of the community.

I would only add on the question of intention, that when the Government acts under section 99A and suppresses a publication it does so in the public interest and it is not concerned with the intention of the author of the publication. The powers given to the Government by section 99A were clearly for the purpose of enabling the Government to take steps to avoid trouble which such publication might possibly cause. It is true that there is a reference under section 99A to the provisions of section 153A of the Indian Penal Code. In this latter section, however, there is no specific mention of the intention of the author of the publication. Had the legislature intended that the prosecution must prove in proceedings under this section that the publication was made with the deliberate intent to promote feelings of enmity or hatred between different classes, specific provision would have been made therein. There being no reference in section 153A to the intention of the

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author of the publication it clearly follows that the general presumption that a man must be held to intend the natural consequences of his act applies.

I agree in dismissing this application.

NIAMAT-ULLAH, J.:—I concur.

BY THE COURT:—The application is dismissed, and the applicant must pay the costs of the respondent which we assess at Rs.200 in addition to the costs of translation and printing.

### APPELLATE CIVIL

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*Before Mr. Justice Harries and Mr. Justice Rachhpal Singh*

MANGALSEN JAIDEO PRASAD (DEFENDANT) v. GANESHI LAL AND OTHERS (PLAINTIFFS)\*

*Shah jog hundi—Negotiable Instruments Act (XXVI of 1881), sections 1, 5, 13—Bill of exchange—Negotiable instrument outside the Act—Mercantile usage—Liability of indorser to indorsee.*

A Shah jog hundi is not a bill of exchange as defined in section 5 of the Negotiable Instruments Act, as it is not an order directing the drawee to pay either to a certain person named, or to the bearer of the instrument. It is, therefore, not a negotiable instrument as defined in section 13 of the Act.

The Negotiable Instruments Act, however, deals with only three specified classes of negotiable instruments, namely promissory notes, bills of exchange and cheques, as defined in the Act, and it does not deal with other kinds of negotiable instruments. Section 1 of the Act provides that the Act does not affect any local usage relating to any instrument in an oriental language. Such an instrument may therefore be a negotiable instrument independently of the definitions of the Negotiable Instruments Act, if the character of negotiability has been impressed on it by established mercantile usage.

A Shah jog hundi has been treated and recognized by Indian custom and law as a negotiable instrument, although it does not come within the definition of a bill of exchange in the Act; and it being a negotiable instrument, the general provisions of

\*Second Appeal No. 1370 of 1933, from a decree of Ganga Nath, District Judge of Aligarh, dated the 16th of August, 1933, confirming a decree of Y. S. Gahlaut, Munsif of Koil, dated the 7th of January, 1932.

the Act will be applied and an indorser is liable to the indorsee in case of the drawee's failure.

Messrs. *A. Sanyal* and *C. B. Agarwal*, for the appellant.

Messrs. *Panna Lal* and *Mukhtar Ahmad*, for the respondents.

HARRIES and RACHHPAL SINGH, JJ.:—These are three defendants' second appeals arising out of three separate suits to recover certain sums of money. The points in issue between the parties in all the three suits are exactly alike; we therefore propose to dispose of them by one judgment.

A firm styled "Mohan Lal Babu Lal" of Aligarh drew three hundis upon themselves. The form of these hundis was as follows:

"To Bhai Mohan Lal Babu Lal of the good and prosperous place of Aligarh, from Mohan Lal Babu Lal of Aligarh, whose compliments please accept.

"We draw one hundi on ourselves for Rs.1,000 (in words, one thousand), double of Rs.500, payable after sixty days from the date . . . here deposited with Bhai Mangal Sen Jaideo Prasad.

"Please pay to a 'Shah' after making usual inquiries in accordance with the usage of the market."

The three hundis in suit were endorsed by the firm of Mangal Sen Jaideo Prasad, the defendants, as follows:

"This hundi is sold to Hoti Lal Babu Lal by Mangal Sen Jaideo Prasad."

The plaintiffs, in whose favour the hundis were endorsed by the defendants' firm, presented them for payment after they had fallen due, to the firm of "Mohan Lal Babu Lal" who were, as we have stated above, both drawers and drawees. This firm, however, became insolvent and was unable to meet the demand. Thereupon the plaintiffs endorsees demanded payment from the defendants endorsers; but they did not pay the amount due. The plaintiffs thereupon instituted three suits to recover the amount due in respect of these three

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hundis against the defendants. It was alleged by the plaintiffs that the defendants' firm had received full consideration when they endorsed the hundis in plaintiffs' favour.

The defendants pleaded that they had sold the hundis without receiving any consideration and that the hundis in question were not negotiable instruments and for these reasons they were not liable. Some other pleas were taken but it is not necessary to refer to them.

Both the courts below found that the endorsements made by the defendants' firm in favour of the plaintiffs' firm were with consideration and that the hundis were negotiable instruments within the definition of the Negotiable Instruments Act, and that therefore the defendants endorsers were liable to the endorsees in respect of the amount due on the aforesaid three hundis and the suits were accordingly decreed. The defendants have preferred three appeals against the decision of the lower appellate court.

The first question for consideration is as to whether or not the hundis in question are negotiable instruments as defined in the Negotiable Instruments Act (Act XXVI of 1881).

It is common ground between the parties that the hundis are what is commonly known as "Shah jog hundis", i.e., a hundi payable only to a respectable holder, that is a man of worth and substance known in the bazar.

The case of the plaintiffs is that these hundis are bills of exchange. Section 5 of the Negotiable Instruments Act defines that "A bill of exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument."

Keeping in view this definition, we proceed to consider whether the hundis before us have all the ingredients

of a bill of exchange. A bill of exchange is an instrument in writing. The hundi before us is such an instrument. The second condition is that it contains an unconditional direction or order. This element is wanting in the hundis before us. Thirdly it must be signed by the maker. In the case before us, it is signed by the maker. Fourthly it must direct a certain person to pay a certain sum of money. The hundis direct the drawees (who in the case before us happen to be the drawers themselves) to pay a certain sum of money. In the present case there is a direction to pay a certain sum of money. The fifth condition is that the money should be paid only to, or to the order of, a certain person, or to the bearer of the instrument. This element is wanting in the hundis before us. Thus the ingredients wanting in the hundis before us are two. They do not direct that the money should be paid to the bearer of the instrument. They do not further direct payment to be made to a named person. The direction given is that the payment is to be made to a "Shah". If the directions in the hundis had been that they should be paid to a named person or to the bearer of the instrument, then they would have come within the definition of a "bill of exchange" as given in section 5 of the Negotiable Instruments Act. In the hundis before us there is no direction that the payment is to be made to the bearer. Nor is there any direction that the payment is to be made to a certain person. Before the drawee makes payment he has to satisfy himself that the person demanding payment is a "Shah". If the drawee is satisfied that the person demanding payment is not a Shah, then he is entitled to withhold the payment. If the drawee, without making due inquiries, makes payment to a person alleging himself to be a Shah, but who subsequently is proved not to be a Shah, then the drawer will not be liable to the drawee. Where the drawer and the drawee happen to be different persons, the drawer will be justified in saying to the drawee who demands

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payment "I gave you an order to make payment to a Shah; but you made payment to a person who is not a Shah and therefore I am not liable to reimburse you". It is necessary that a bill of exchange ought to specify to whom the sum is payable, for in no other way can the drawee, if he accepts it, know to whom he may properly pay it so as to discharge himself from all further liability. Now if the bill is payable to bearer, the drawee is directed to pay to the bearer and as soon as the drawee pays the amount mentioned in the bill to the bearer his liability to the drawer ceases. But where a bill is payable to a certain person then it must show on the face of it as to who that person is. Now, one way is to mention the name of the payee. But it is not absolutely necessary. All that is necessary is that the bill must point out with certainty the party who is to receive the money. Now in the case of Shah jog hundi the drawee is directed to pay to a Shah after making inquiries and after satisfying himself that he is a Shah. So it can not be said that a "Shah jog hundi" is a bill of exchange, for the simple reason that it is not an order directing the drawee to pay to a certain person named or to a person whose identity is sufficiently indicated.

We would like to point out that in *Kannayalal Bhoya v. Balaram Paramasukdoss* (1) an opinion was expressed that "Shah jog hundi" was a negotiable instrument within the definition in section 13, clause (2) of the Negotiable Instruments Act of 1881, as amended by the Negotiable Instruments Amendment Act of 1914. In that case a hundi was payable in the alternative to one of the several payees. The learned CHIEF JUSTICE of the Madras High Court made the following observations which are to be found at page 483 of the report: "As regards four of these documents, in my judgment the documents in question were negotiable instruments; I think they come directly within the definition in section 13, clause (2) of the Negotiable Instruments Act

(1) (1922) 43 M.L.J., 480.

of 1881, as amended by the Negotiable Instruments Act of 1914, as being payable in the alternative to one of several payees. But, whether this is right or not, they are in my judgment still covered by rule 63A of the Original Side Rules." COURTTS TROTTER, J., in his judgment at page 485 observes as follows: "In the next place I am unable to follow the order and judgment which appear to hold that a Shah jog hundi of this form is not a negotiable instrument. It seems to me that there are many reasons for supposing that it is. I am perfectly content to take it that the words payable to any 'Shah' (which was translated, 'a respectable person') are so vague and indefinite as to be incapable of enforcement in a court of law and, therefore, the instrument stands as payable to Khannya Lalji, the drawee." It will be seen that though an opinion was expressed that a "Shah jog hundi" is a negotiable instrument within the definition in section 13, clause (2) of the Negotiable Instruments Act, yet the point was not definitely decided, because the instrument in question there came within rule 63A of the Original Side Rules, and could, therefore, be treated as a negotiable instrument.

Learned counsel appearing for the appellant relied before us on two rulings of the Calcutta High Court: *Assaram v. Kesri Chand* (1) and *Keshari Chand v. Asharam Mahato* (2). In our opinion, these cases do not help us in deciding the question before us. In both these cases it was held that a "Shah jog hundi" was not a bill of exchange as it was only payable to a respectable holder and was therefore not equivalent to a hundi payable to a bearer. It has to be borne in mind that both these cases were decided in the year 1912 and the decision was arrived at with reference to the definition of negotiable instrument, as given in Act XXVI of 1881. The learned Judges in view of the definition held that as the Shah jog hundis before them were payable to certain persons and not to order or to bearer

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(1) (1912) 33 Indian Cases, 247. (2) (1915) 33 Indian Cases, 250.



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they were not negotiable instruments. But since then the definition of negotiable instruments has been changed by the enactment of an Amendment Act (Act VIII of 1919). Before the Act VIII of 1919 it was necessary, in order to make the instrument negotiable, to insert operative words of negotiability, such as "order" or "bearer" or any other term expressing the intention on the part of the drawer or maker to render it negotiable; an instrument drawn payable to a specified person was said to be not negotiable: See on this point *Jetha Parkha v. Ramchandra Vithoba* (1). Under the definition of a negotiable instrument, after the enactment of the Amendment Act (Act VIII of 1919), a bill payable to a particular person containing no words prohibiting transfer or indicating an intention that it shall not be transferable is a bill payable to order: See *Hans Raj v. Lachmi Narain* (2). It would, therefore, appear that cases decided with reference to the definition of a negotiable instrument as given in the Negotiable Instruments Act (Act XXVI of 1881) before the amendment of 1919, to the effect that a Shah jog hundi is not a negotiable instrument, can not help us in deciding the point in issue before us.

The result is that on one side we have the opinion expressed in *Kannayalal Bhoya v. Balaram Paramasukdoss* (3) to the effect that a Shah jog hundi was a negotiable instrument within the definition of section 13, clause (2) of the Negotiable Instruments Act. On the other hand, in the above mentioned two Calcutta cases it was held that such hundis were not negotiable instruments with reference to the Negotiable Instruments Act. We have pointed out that the two Calcutta cases were decided with reference to the definition of bill of exchange as given in the Negotiable Instruments Act before it was amended in 1919. We have, however, come to the conclusion that a "Shah jog hundi" is not a

(1) (1892) I.L.R., 16 Bom., 689. (2) A.I.R., 1923 Lah., 388.  
(3) (1922) 43 M.L.J., 480.

bill of exchange as defined in the Negotiable Instruments Act.

What we have, now, to consider is whether the hundis before us can be said to be negotiable instruments independently of the provisions of the Negotiable Instruments Act. According to the definition of a "negotiable instrument" after the amendment of the Act (Act VIII of 1919), a negotiable instrument means a promissory note, bill of exchange, or cheque payable either to order or to bearer. The hundis before us are not promissory notes or cheques. Nor are they bills of exchange as defined in section 5 of the Negotiable Instruments Act. Now it is important to bear in mind that the Negotiable Instruments Act deals with only three specified classes of negotiable instruments, which are in common use, and it does not purport to deal with all kinds of instruments which have a certain negotiability such as bills of lading, railway receipts, delivery orders. Indian law has always recognized negotiability by custom and there may be instruments which may be impressed with the character of negotiability, and where that question has to be determined it will have to be decided independently of the provisions of the Indian Negotiable Instruments Act. In deciding the question of negotiability it is always important to remember two very essential conditions, both under the Negotiable Instruments Act and mercantile usage. One is that the instrument is transferable like cash by delivery and the other is that the holder *pro tempore* has the title to claim or receive payment in his own name. As already pointed out, the Negotiable Instruments Act deals with only three kinds of instruments, bills of exchange, promissory notes and cheques. It makes no provision as regards hundis, yet it has never been held anywhere that a hundi is not a negotiable instrument. Negotiable instruments, in oriental language, are sometimes promissory notes in form and substance; but generally they are of the type of bills of exchange and are called hundis.

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The Act expressly saves from its operation any local usage relating to such instruments.

-In *Mercantile Bank of India v. D'Silva* (1), there are observations which go to show that a party may be permitted to show that though a particular instrument does not become negotiable under the provisions of the Negotiable Instruments Act, yet it may be shown that in the mercantile world, for many years, it has been the custom to treat such documents as negotiable instruments and as passing by delivery, and therefore it should be treated as a negotiable instrument.

Section 1 of the Negotiable Instruments Act provides that "nothing herein contained affects . . . . any local usage relating to any instrument in an oriental language." It should be borne in mind that the Act is not exhaustive of all matters relating to a negotiable instrument, nor does it purport to deal with all kinds of negotiable instruments. Whenever a question arises as to whether or not a document in an oriental language is a negotiable instrument, the point will have to be decided not by looking to the definition of a negotiable instrument as given in the Negotiable Instruments Act, but independently of its provisions. The courts will find out how such an instrument has been treated in the past and if it appears that according to usage or custom such instruments have been treated as negotiable instruments, then they will be treated as such.

One of the earliest cases on the point is *Davlatram Shriram v. Bulakidas Khemchand* (2). That was a case decided several years before the Negotiable Instruments Act of 1881 came into force. The nature of a "Shah jog hundi" is elaborately discussed in that case by ARNOULD, J., in a very well considered judgment. We find that in that case a Shah jog hundi was treated as a negotiable instrument.

(1) (1928) I.L.R., 52 Bom., 810. (2) (1869) 8 Bom. H.C.R., 24.

Another case on the point is *Balmukand Lal v. Collector of Jaunpur* (1). This is a clear authority against the contentions raised by the appellant. It related to a Shah jog hundi. One Rajah Harihar Dat Dubey had drawn some hundis on himself. These hundis had been accepted by Rajah Harihar Dat, and the plaintiff who was the holder of these hundis sued the Rajah for recovery of the amount due on them. A Bench of two learned Judges of this Court decided that there was nothing in the endorsement which should operate to limit or otherwise affect their negotiability in the hands of the appellant, their endorsee. The learned Judges further remarked as follows: "The hundis were all made payable 'to a respectable person', which was the same in legal effect as payable 'to bearer', and thus their legal and negotiable character was not limited, and obviously was not intended to be limited, by the subsequent writing of the words 'hundi accepted by Rajah Harihar Dat Dubey in favour of Ram Shankar Sukul'."

Another case on the point is *Ganesdas Ramnarayan v. Lachmi Narayan* (2). It was a case relating to a "Shah jog hundi". We find the following observations which are to be found at page 577:

"Now the meaning of hundis made payable to Shah and the usage in regard to such documents among native merchants on this side of India was very fully considered in a case which came before SIR JOSEPH ARNOULD in 1869, in which a large body of evidence was given on the subject—*Davlatram Shriram v. Bulakidas* (3); and, as section 1 of the Negotiable Instruments Act, 1881 (Act XXVI of 1881) states that nothing in that Act contained affects any local usage relating to any instrument in an oriental language unless such usages are excluded by any words in the body of the instrument which indicate an intention that the legal relations of the parties thereto shall be governed by that Act, and no such words are to be found in the hundi in question, the usage proved as well as the decision in that case afford a guide of which this Court can avail itself in the deter-

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(1) Weekly Notes 1884, p. 3.

(2) (1804) I.L.R., 18 Bom., 570.

(3) (1869) 6 Bom. H.C.R., 24.

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mination of the points submitted for our consideration by the Chief Judge of the small causes court."

In *Madho Ram v. Nandu Mal* (1) SHADI LAL and WILBERFORCE, JJ., held that a Shah jog hundi was a negotiable instrument. It will, however, be seen from the observations made at page 983 that it was conceded in that case that "Shah jog hundis" were negotiable instruments. The learned Judges, in their judgment, at page 983 remarked:

"Because it is admitted by the learned counsel for the respondent that the hundis in question must be regarded as negotiable instruments. . . . The instrument, in respect of which the Additional Judge has given his verdict against the appellant, is what is called a 'Shah jog hundi' which is a bill payable to a Shah or banker. A hundi of this kind is similar, to some extent, to a cheque, crossed generally, which is payable only to, or through, some banker. The object in both cases is that the payment should be made to a respectable person and not to a person who has got hold of the instrument in a surreptitious manner. In the case of a Shah jog hundi it is the duty of the payer to make inquiry before payment that the payee is a respectable person, so that if the hundi turns out to be a stolen or a lost one, or to contain a forged endorsement, the payer may be able to demand a refund from the Shah to whom the money has been paid by mistake."

Another case on the point is *Champaklal Gopaldas v. Keshrichand* (2). The nature of a Shah jog hundi was considered by MIRZA, J., in that case at very great length in an elaborate and exhaustive judgment and he came to the conclusion that a Shah jog hundi was a negotiable instrument till it reaches a "Shah", when it ceased to be negotiable. At pages 779 and 780, he made the following observations:

"As a result of these authorities the conclusion I have come to with regard to 'Shah jog' hundis is that a 'Shah jog' hundi in its inception is a hundi which passes from hand to hand by delivery and requires no indorsement. . . . Indeed the body of the hundi requires that the amount be paid to a Shah. It contemplates the hundi passing from hand to hand until it

(1) (1920) 58 Indian Cases, 982.

(2) (1925) I.L.R., 50 Bom., 765.

reaches a Shah who, after making due inquiries to secure himself, would present it to the drawee for acceptance or for payment. . . . But although a 'Shah jog' hundi in its inception is one which passes by delivery without any indorsement, yet it may at any time be restricted by being specially indorsed. Where any such restriction appears on the face of the hundi, that restriction applies to it and it ceases to be a bearer hundi which can pass from hand to hand. . . . Further, the negotiability of the 'Shah jog' hundi as a bearer hundi comes to an end when it reaches the hands of the Shah."

Another case on the point is *Murli Dhar Shankar Das v. Hukam Chand Jagadhar Mal* (1). There a Bench of two learned Judges of the Punjab High Court held that a "Shah jog hundi" was not equivalent to a hundi payable to bearer and it ought not to be paid by the drawee unless it has endorsed on it, when presented, the name of the Shah by whom it is presented or rather by whom it is sent for presentation, although it is presented by a respectable person. A perusal of this case, however, shows that it is no authority for the proposition that a "Shah jog hundi" is not a negotiable instrument. It may be that a Shah jog hundi is not a bill of exchange and therefore not a negotiable instrument within the Negotiable Instruments Act; but it may, nevertheless, be a negotiable instrument because it is a document in vernacular, which is not dealt with by the Indian Negotiable Instruments Act of 1881.

No case has been cited before us in which it may have been held by any of the High Courts in India that a "Shah jog hundi" was not a negotiable instrument. It is true that in *Assaram v. Kesri Chand* (2), and *Keshari Chand v. Asharam Mahato* (3), it was held that a "Shah jog hundi" was not a bill of exchange; but these decisions were arrived at with reference to the definition of a "bill of exchange" as it appeared in Act XXVI of 1881 before its amendment in 1919. Even after the amendment "Shah jog hundis" can not come within the

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(1) A.I.R., 1932 Lah., 312.

(2) (1912) 33 Indian Cases, 247.

(3) (1915) 33 Indian Cases, 250.

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definition of "bill of exchange" as given in section 5 of the Act; but as we have already pointed out, the question which we have to decide is not whether a "Shah jog hundi" is a bill of exchange but whether it is a negotiable instrument independently of the provisions of the Negotiable Instruments Act. As we have already mentioned, the Act does not govern the hundis or documents in vernacular; the hundi may not come within the definition of "bill of exchange" as given in section 5 of the Negotiable Instruments Act and yet it may be a negotiable instrument because negotiability of such documents has been recognized in India.

In *Krishnashet v. Hari Valji Bhatye* (1) it was held that the Negotiable Instruments Act (XXVI of 1881), in the absence of local usage to the contrary, applies to hundis. The same view is expressed in *Moti Lal v. Moti Lal* (2). As has already been pointed out by us, the Negotiable Instruments Act is not exhaustive of all matters relating to negotiable instruments. It merely regulates the issue and negotiation of bills of exchange, promissory notes and cheques. And as decided in *Krishnashet v. Hari Valji Bhatye* (1), and *Moti Lal v. Moti Lal* (2), the provisions of the Act will be applied even to hundis and other instruments in oriental language.

After a consideration of the case law on the subject we are of opinion that it must be held that a "Shah jog hundi", which is a document in vernacular, is a negotiable instrument although it does not come within the definition of a "bill of exchange". This view was taken in *Balmakund Lal v. Collector of Jaunpur* (3) by a Bench of two learned Judges of this Court and we find that this view has never been challenged. It is also to be borne in mind that in several cases to which we have already referred, the same view was taken and we there-

(1) (1895) I.L.R., 20 Bom., 488. (2) (1883) I.L.R., 6 All., 78.  
(3) Weekly Notes 1884, p. 3.

fore find no justification for differing from the view expressed by a Bench of this Court. We must, therefore, hold that the decision of the learned Judge of the lower appellate court is correct and must be affirmed.

Learned counsel for the appellant contended that there was no proper presentation of the hundis in question. This contention can not be accepted, as it appears from the judgment of the first court that the point was not pressed before it.

For the reasons given above, the three appeals stand dismissed with costs.

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## REVISIONAL CRIMINAL

*Before Mr. Justice Harries*

MOTI PANSARI v. USMAN AND OTHERS\*

*Court Fees Act (VII of 1870), section 19, clause xvii—Exemption from court fee—Petition by prisoner—Application in revision by a prisoner against the acquittal of the opposite party—Not exempt from court fee.*

Section 19, clause xvii, of the Court Fees Act contemplates a petition by a prisoner claiming some relief or indulgence or right on behalf of himself in his capacity as a prisoner. An application filed by a prisoner for revision of an order of acquittal of the opposite party is wholly unconnected with the applicant's condition or status as a prisoner and asks for no relief affecting him in his capacity as a prisoner; it does not fall within section 19, clause xvii and is not exempt from court fee.

Sir C. Ross Alston and Mr. Madan Mohan Lal, for the applicant.

The application was heard *ex parte*.

HARRIES, J.:—This is an application in revision filed by one Moti Pansari praying that an order of acquittal passed by the Second Additional Sessions Judge of Gorakhpur, dated the 2nd of January, 1935, be set aside

\*Criminal Revision No. 64 of 1936.



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and the opposite parties convicted and sentenced according to law.

The application is not stamped, neither is the copy of the judgment which is filed with it. The office has reported that the application and copy of the judgment should be stamped; but Sir *Charles Ross Alston* on behalf of the applicant contends otherwise and relies on section 19, clause xvii of the Court Fees Act (Act VII of 1870). Section 19 provides that nothing contained in the Act shall render certain documents chargeable with any fee, and among the documents so exempted are documents mentioned in clause xvii, viz, petitions by prisoners or other persons in duress or under restraint of any court or its officers.

The applicant Moti Pansari was convicted by this Court and sentenced to a term of imprisonment for an offence under section 148 of the Indian Penal Code and was at the date of this application and is at the present moment in jail undergoing that term of imprisonment. It is therefore argued on his behalf that the present application comes within clause xvii of section 19 of the Court Fees Act by reason of the fact that this is a petition by an applicant who is actually a prisoner. In my view this is not a petition by a prisoner, within the meaning of that phrase as used in section 19, clause xvii of the Court Fees Act. In my judgment clause xvii of section 19 of the Court Fees Act contemplates a petition by a prisoner claiming some relief or indulgence or right on behalf of himself in his capacity as a prisoner. Here the application does not concern the liberty, safety or rights of the prisoner himself. It is, on the contrary, an application affecting the rights and freedom of other persons not in custody. The prayer is that the opposite parties who are at liberty should be put in peril by setting aside the order acquitting them. The application is wholly unconnected with the applicant's condition or status as a prisoner and asks for no relief affect-

ing him in his capacity as a prisoner. That being so, this application does not fall within clause xvii of section 19 of the Court Fees Act and therefore the application and the copy of the judgment are not exempted from stamp fees.

In the result, therefore, I hold that both the application and the copy of judgment must bear the appropriate stamp.

Admit and issue notice to the opposite parties, provided the court fee is paid.

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### APPELLATE CIVIL

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and  
Mr. Justice Bennet*

ZAINAB BIBI (PLAINTIFF) v. UMAR HAYAT KHAN AND  
OTHERS (DEFENDANTS)\*

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*Agra Pre-emption Act (Local Act XI of 1922), sections 3 (proviso) and 16—Partial pre-emption—Houses and share of zamindari sold together—Pre-emptor who has disqualified himself from pre-empting the houses can pre-empt the zamindari alone—Pre-emption of houses is not a pre-emption under the Act—Agra Pre-emption Act, section 4(3)—“Land” whether includes houses.*

A share in three villages, as also a share in two houses situate in one of the villages, were sold together by one sale deed. A suit for pre-emption was brought in respect of the entire property sold; but it was found that the plaintiff had, prior to the suit, gifted away her share in the houses and, moreover, had failed to make the necessary demands under the Muhammadan law, and that in respect of two of the villages the vendee stood on an equal footing with the plaintiff: *Held* that the plaintiff was entitled to pre-empt the share of the third village, upon payment of a proportionate share of the sale price.

According to section 16 of the Agra Pre-emption Act a pre-emptor is bound to enforce his right of pre-emption in respect of the whole of the property which he is entitled to pre-empt

\*Second Appeal No. 1123 of 1933, from a decree of J. N. Kaul, Additional Subordinate Judge of Fatehpur, dated the 13th of April, 1933, confirming a decree of N. P. Sanyal, Munsif of Fatehpur, dated the 30th of June, 1932.

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under that Act. The section is comprehensive and contains the whole rule regarding partial pre-emption, and it is not necessary for the pre-emptor to include in his claim such portions of the property sold as he may be entitled to pre-empt under the Muhammadan law or any other law or custom outside the Agra Pre-emption Act. All that is necessary is that he must bring his suit for pre-emption in respect of the whole of the property which he may be entitled to pre-empt under the Agra Pre-emption Act; and if there are any items of the property sold which he is not entitled to pre-empt under that Act, then neither the omission to claim to pre-empt them nor his having disqualified himself from pre-empting them is fatal to his claim as regards the property pre-emptible under the Act.

The fact that section 3, proviso, of the Agra Pre-emption Act refers to the Muhammadan law of pre-emption does not make a right to pre-empt a house under the Muhammadan law a right of pre-emption to which the plaintiff is entitled under the Agra Pre-emption Act; when such a right is enforced, it is not enforced under the Act but under the Muhammadan law.

Where a person is the owner of a house and also of a half share in the site on which it stands, it can not be said that the house should be considered to be attached to the half share in the site, and the house does not come within the definition of the word "land" in section 4(3) of the Agra Pre-emption Act.

Mr. *Shiva Prasad Sinha*, for the appellant.

Sir *S. Wazir Hasan* and Mr. *K. Verma*, for the respondents.

SULAIMAN, C.J., and BENNET, J.:—This is a plaintiff's appeal arising out of a suit for pre-emption. The plaintiff's husband, Amindad Khan, was the owner of a half share in three villages, and the owner of two houses which were situated in one of the three villages. The plaintiff on his death claimed to be entitled to a one-eighth share in the zamindari properties and one-fourth share in the two houses. On the 15th of June, 1930, the three sisters of the plaintiff's husband executed a sale deed of their shares in the zamindari properties and in the two houses in favour of the defendants, who were admittedly strangers. Before the institution of the suit the plaintiff executed a deed of gift in respect of the house properties, but she alleged that that gift was

invalid and ineffective as it had not been given effect to. She brought a suit for pre-emption of the entire property sold under the sale deed and offered to pay the entire consideration which might really have been paid by the vendee, but put forward the case that the amount of sale consideration had been inflated. The defendants took the plea that the deed of gift was valid and the plaintiff had lost her right of pre-emption in respect of the house properties; and they further pleaded that she had in consequence lost her right to pre-empt even the zamindari properties. Both the courts below have dismissed the claim. So far as the plaintiff's claim to pre-empt the houses under the Muhammadan law is concerned it must fail. The courts below have found that she had parted with her interest in the house properties validly under the deed of gift, and that the deed of gift was not fictitious and ineffective. There is a further finding that she has failed to perform the necessary demands as required by the Muhammadan law. It has, however, been found that the vendee is on an equal footing with the pre-emptor as regards the shares in two villages, and that the plaintiff has no preference as against him in those two villages. The appeal is accordingly confined to village Kote Mustaqil.

The only question which remains for consideration is whether in consequence of the failure of the plaintiff's claim to pre-empt the shares in the two houses her claim to pre-empt the zamindari property in Kote Mustaqil as well must fail.

No doubt it is a well settled principle that a pre-emptor cannot be allowed to pick and choose and pre-empt only as much property as he considers convenient to get. In that sense partial pre-emption cannot be allowed. On the other hand, it has been equally well settled in this Court that the mere fact that the vendee has included in the sale deed some property as to which the pre-emptor has no right of pre-emption at all, would not deprive the pre-emptor of his right to pre-empt that

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property as to which he has a right. - There has so far been no conflict of opinion on this point in this Court, and thousands of cases have been decided in which the pre-emptor has been allowed to claim pre-emption in respect of that portion to which he is entitled, leaving out the portion to which he was not entitled, although the same was included in the sale deed. In such cases an apportionment of the price has been allowed, and in many cases issues have been sent down to the court below for making such an apportionment. So far as the Muhammadan law is concerned, there is no doubt that where several properties are sold, in portions of which a pre-emptor has the right of pre-emption, he is entitled to pre-empt that portion only on payment of a proportionate price. On this point there was a consensus of opinion among the three Imams as quoted in the *Fatawa Alamgiri*, referred to in *Oomur Khan v. Moorad Khan* (1).

The same rule of law was applied to a customary right of pre-emption by a Full Bench of this Court in *Salig Ram v. Debi Parshad* (2), where although the sale deed had included shares in two thoks together with a bungalow, garden and factory, the claim for pre-emption was allowed in respect of a share in one thok to the exclusion of another thok, and the claim for pre-empting the bungalow, garden and factory was also disallowed. The court directed that it was necessary to ascertain separately the value of the several properties sold. The same rule was laid down in *Durga Prasad v. Munsif* (3), where it was pointed out that there was a general rule that "every suit for pre-emption must include the whole of the property, subject to the plaintiff's pre-emption, conveyed by one bargain of sale to one stranger; and that a suit by a plaintiff pre-emptor, which does not include within its scope the whole of such pre-emptional property, is unmaintainable as being inconsistent with the nature

(1) (1865) S.D.A. (N.W.P.), 173. (2) (1874) 7 N.W.P.H.C.R., 38.  
(3) (1884) I.L.R., 6 All., 423.

and essence of the pre-emptive right." It was pointed out (at page 426) that there was a clear exception in the case where "under one and the same deed of sale, property subject to pre-emption is sold along with other property not subject to the right, and the plaintiff pre-emptor cannot, *ex necessitate rei*, sue for the whole property conveyed by the sale, but only for so much as is subject to his pre-emptive right." The learned counsel for the respondent concedes that this rule has been invariably followed in numerous cases by this Court. We may only refer to a recent case, *Mohindra Man Singh v. Maharaj Singh* (1), where it was held (at page 76) that "it is the duty of the pre-emptor to claim pre-emption in respect of the whole of that part of the property sold as to which he has a right, failing which his whole claim must fail. If the vendee has included properties in which the plaintiff has no right to pre-empt, the pre-emptor is entitled to exclude them, but he must nevertheless claim pre-emption in respect of the whole of that part with regard to which he has the right."

The origin of the customary law in this province obviously was the rules of Muhammadan law which were found prevalent in these parts, and the custom grew up somewhat on those lines. Apparently the idea was that if a pre-emptor has a right to pre-empt certain properties, the vendee cannot by taking a sale deed of that property along with other property, whether movable or immovable, deprive the pre-emptor of his right to pre-empt that property as to which he has a right. If this were not the law, then a vendee by taking a sale deed of pre-emptible property along with any movable property would prevent pre-emption altogether. Similarly the vendee may include shares in some villages in which he is a co-sharer and therefore on the same footing with the pre-emptor. In such a case the integrity of the bargain will have to be broken and the claim decreed for the

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pre-emptible part only. Of course, in such cases the proportionate price has to be ascertained and paid. This position could not be disputed prior to the coming into force of the Pre-emption Act of 1922. This Act has, to a great extent, consolidated the old law, though undoubtedly in some particulars it has amended the old law also. The question is whether under the provisions of the new Act a different rule should now prevail.

*Prima facie* the Pre-emption Act is quite comprehensive and exhaustive, and ordinarily it would not be necessary to import into it general principles which are not embodied therein. Section 11 confers a right of pre-emption on sale or foreclosure of any proprietary interest in land to persons mentioned in section 12. If that section stood by itself then a right of pre-emption would accrue in respect of the sale of all and every item of land sold; but section 16 lays down certain restrictions and in essence embodies the principle of the prevention of partial pre-emption. The latter portion of it says "no suit shall lie for enforcing a right of pre-emption in respect of a portion only of the property which the plaintiff is entitled to pre-empt under the Act". A pre-emptor is, therefore, bound to enforce his right of pre-emption in respect of the entire property which he is entitled to pre-empt under the Pre-emption Act. Section 16 contains a prohibition which must be understood to be quite comprehensive, and any case which is not covered by this prohibition should be considered to be permissible. It would follow that where there is property which the pre-emptor is not entitled to pre-empt under the Act, he can leave it out and his suit would not fail by reason of his having left out that property. It is only incumbent upon him to include in his claim all such property as he is entitled to pre-empt under the Act.

Before 1929 the words "under the Act" were no part of this section. The language then was far more ambiguous, and it was somewhat doubtful whether a pre-emptor was not bound to include in his claim all

properties as to which he had a right of pre-emption, whether under the Agra Pre-emption Act or under the Muhammadan law or any contract or custom. *Abdul Khan v. Shakira Bibi* (1) was a case where the pre-emptor had, on account of his failure to perform the necessary demands, disqualified himself from pre-empting the share in a certain house, and it was held that his claim to pre-empt the zamindari property also must fail in view of the provisions of section 16 as it then stood. No doubt at page 351 there was an observation that even if words like "in accordance with the provisions of the Act" or "pre-empt under the Act" were taken to be understood at the end of section 16 it would make no difference, because the right under the Muhammadan law was maintained under section 5 of the Act and therefore it could be said in one sense that the pre-emption of the house under the Muhammadan law was "in accordance with the provisions of section 3". The observation was in the nature of an *obiter dictum* and was stated to be incorrect in *Amjad Ali Khan v. Saadat Begam* (2). In that case also the question of the applicability of section 16, as it stood before the amendment, i.e., before the addition of the words "under the Act", arose. Referring to the case of *Abdul Khan v. Shakira Bibi* (1), the Bench observed (at page 526): "At another place in the judgment it was remarked that the enforcement of such a right under the Muhammadan law would also be a pre-emption under the Act. This last expression was certainly inaccurate, but that was a case to which the Act in its entirety was applicable." In the latter case the house as to which the plaintiff had lost his right was situated in the city of Moradabad, and it was held that by the mere fact that the plaintiff did not properly exercise his right under the Muhammadan law in respect of the house in the city of Moradabad, to which the Act was not applicable, he had not lost his right to pre-empt the property in the village, to which the Act

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(1) (1927) I.L.R., 50 All., 548.

(2) (1931) I.L.R., 53 All., 524.



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applied. The great hardship which might arise was pointed out by the Bench in *Abdul Khan's* case at pages 350—1. Soon after the difficulty had been pointed out the legislature amended section 16 and added the words “under the Act”. The additional words must have a special significance. The obvious intention is that a pre-emptor is no longer compelled to include in his claim properties to which he may be entitled under some law or custom outside the Agra Pre-emption Act, and all that is now necessary is that he must bring his suit for pre-emption in respect of the property which he is entitled to pre-empt under the Agra Pre-emption Act.

The question is whether a right to pre-empt a house under the Muhammadan law can be said to be a right to which a pre-emptor is entitled under the Act. It has been strongly contended on behalf of the respondents that the proviso to section 3 of the Agra Pre-emption Act makes it clear that the Muhammadan law has been made applicable by this Act to certain class of cases, and that accordingly when such a right is exercised the right must be deemed to be exercised under the Agra Pre-emption Act. We are unable to accept this contention. If section 3 had not been there then the right of pre-emption under the Muhammadan law, or for the matter of that, under the customary law, or under special contracts, would have remained intact. The substantive portion of section 3 takes away all such right in respect of interest in land in any area to which this Act applies; but the abolition of customary and other rights of this kind is subject to the proviso that where there is no right of pre-emption under section 5 of the Act the provisions of Muhammadan law of pre-emption shall not be affected in case the vendor and pre-emptor are both Muhammadans. It follows that the Muhammadan law has not been taken away by section 3 in the case where there is no right of pre-emption under section 5 and the vendor and the pre-emptor are both Muhammadans. The

proviso must be read as part and parcel of section 3 and the effect of the whole section is that in that particular case the Muhammadan law has remained untouched and has not been abrogated. The position is similar to the reservation in regard to other rights of pre-emption under special laws mentioned in sections 6 and 7 of the Agra Pre-emption Act. The right of pre-emption under the Act mentioned therein has been preserved and not affected by the Agra Pre-emption Act. When such a right is enforced it cannot be said that the right is being enforced under the Agra Pre-emption Act, and not under those enactments. It is, therefore, difficult to hold that a right of pre-emption in respect of a house exercised under the Muhammadan law can be said to be a right to which the plaintiff is entitled under the Pre-emption Act.

The learned counsel for the respondents has relied very strongly on the recent pronouncement of their Lordships of the Privy Council in *Birendra Bikram Singh v. Brij Mohan Pande* (1). That was a case under the Oudh Laws Act of 1876. There a single mahal of taluqdari consisted of 163 villages and was sold as one property for a large sum of Rs.5,50,000. The pre-emptor was not a co-sharer or a superior proprietor in any of these villages at all; but he was an under-proprietor in one out of the 163 villages, and claimed a right of pre-emption under section 9 of the Oudh Laws Act on the ground that he was a member of the village community and came within the third class specified therein. Two questions arose for consideration. The first was whether the under-proprietor who had an interest in one village only had a right to pre-empt that village; and the second was whether he could come within the meaning of the words "member of the village community". Their Lordships quoted the relevant sections 6 to 13 *in extenso* in order to consider whether under the provisions of that special enactment the plaintiff's claim

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could be decreed. Now under the Oudh Laws Act section 10 made it obligatory on the vendor to give notice to the persons concerned of the price at which he is willing to sell the property, and also made it necessary that such notice should be given through the court within the local limits of whose jurisdiction the property or any part thereof was situated. Under section 14 of the Agra Pre-emption Act, however, sending of the notice is by no means obligatory but is purely discretionary. It is also a fact that in the Oudh Laws Act there is no special section like section 16 embodying the rule of partial pre-emption. On an examination of the provisions of that Act their Lordships, overruling the cases of the Oudh court, came to the conclusion that an under-proprietor who had an interest in one village only which was a part of a whole mahal of 163 villages which had been sold as one property had no right to pre-empt one part of the entire mahal, as there was no duty on the vendor to name any properties other than the full price of Rs.5,50,000, which, of course, the under-proprietor would not be prepared to pay for one village only. We are not concerned with the other question which was decided in that case. Obviously that case was decided on the language of the sections in the Oudh Laws Act, and in Oudh the right of pre-emption was purely a creature of statute. The provisions of the Agra Pre-emption Act embody the previous customary law of this province and are not identical with those of the Oudh Laws Act; in particular, section 16 has been specially enacted, which *prima facie* is intended to be comprehensive and to include the whole rule of partial pre-emption. We have to interpret that section in this case. It, therefore, seems to us that the ruling of the Privy Council under the Oudh Laws Act cannot be said to have overruled the long series of decisions of this Court, arising under the customary law, or under the Agra Pre-emption Act.

We are accordingly of the opinion that if the pre-emptor was not entitled to pre-empt the houses under the Agra Pre-emption Act, then neither the omission to pre-empt them nor her disqualification in pre-empting the same is fatal to her claim as regards the properties which she is entitled to pre-empt under the Agra Pre-emption Act.

As stated above, the plaintiff's husband was entitled to a half share in the site and the entire houses standing thereon. It is very difficult to say that the two houses should be considered to be attached to, or permanently fastened to, anything attached to the half share in the land which was sold. If the husband had been the owner of the entire site on which the houses stood, the position would have been different. Following the interpretation of the definition of the word "land" in section 4 (3) as laid down in *Mohindra Man Singh v. Maharaj Singh* (1), we must hold that the houses were not land within the meaning of the Agra Pre-emption Act.

Accordingly we allow the appeal and decree the plaintiff's claim for pre-emption of the share in Kote Mustaqil on payment of the proportionate price. We, therefore, send down the following issue to the court below for determination: What was the proportionate price of the share pre-empted in village Kote Mustaqil? The parties will be at liberty to produce fresh evidence, if necessary. The finding should be returned within three months from this date. The usual ten days will be allowed for objections.

(1) (1922) I.L.R., 45 All., 72.

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Before Mr. Justice Harries and Mr. Justice Bajpai

SHYAM LAL (JUDGMENT-DEBTOR) v. BAHAL RAI

(DECREE-HOLDER)\*

*Civil Procedure Code, order XXXVIII, rule 5—Applicable where, before the execution sale of the whole of the mortgaged property, it is apprehended that a personal decree will have to be passed—Jurisdiction—Civil Procedure Code, order XXXIV, rule 6.*

Where, before the whole of the mortgaged property has been sold in execution of a decree under order XXXIV, rule 5 and a right to apply for a personal decree under rule 6 can have arisen, the mortgagee satisfies the court that the amount likely to be realised by the sale of the rest of the mortgaged property would not be sufficient to satisfy the decretal amount and that a personal decree for the balance would have to be passed subsequently under order XXXIV, rule 6, then, inasmuch as the original suit is still undisposed of, in the sense that the plaintiff mortgagee is entitled in certain circumstances to obtain a personal decree, the court has jurisdiction to act under order XXXVIII, rule 5, if the conditions contemplated by that provision are made out, and to attach other properties of the mortgagor before any personal decree under order XXXIV, rule 6 has been passed or applied for.

Mr. S. B. Johari, for the appellant

Messrs. K. C. Mital and P. M. Verma, for the respondent.

HARRIES and BAJPAI, JJ.:—This is a judgment-debtor's appeal against an order passed by the Additional Subordinate Judge of Moradabad allowing the decree-holder's application for attachment of certain property before judgment.

In the year 1929 the decree-holder brought a suit upon a mortgage for the sale of certain property, the subject-matter of that mortgage. In due course he obtained a preliminary decree and then a final decree and eventually he put up for sale certain portions of the property mortgaged. By the sale of these properties the decree-holder recovered a substantial part of the sum due, but it would appear that the amount that he was

\*First Appeal No. 211 of 1934, from an order of Lachhman Prasad, Additional Subordinate Judge of Moradabad, dated the 30th of August, 1934.

likely to obtain upon the sale of the remaining property was insufficient to satisfy the whole of the debt due to him.

Before proceeding with the sale of the remainder of the mortgaged property the decree-holder made an application in the court of the Additional Subordinate Judge of Moradabad praying for the attachment of certain other property of the judgment-debtor before obtaining a personal decree against him. The learned Additional Subordinate Judge having heard arguments passed an order in these terms: "The judgment-debtor Shyam Lal objects. I have heard counsels for both parties. The application of the decree-holder is proper and maintainable, vide *Jogemaya Dassi v. Baidyanath Pramanick* (1). The objection of the judgment-debtor has no force. I allow the application, and order under order XXXVIII, rule 5 of the Civil Procedure Code attachment of the properties mentioned in the application but to the extent of about Rs.12,000 only, which amount appears to be likely to remain unpaid after the mortgage securities are exhausted."

The appellant judgment-debtor contends before us that the learned Subordinate Judge had no jurisdiction to entertain this application. It was contended that the decree-holder could not obtain a personal decree against the judgment-debtor until the mortgaged properties had all been sold, and this, admittedly, had not been done when the application was made to the learned Subordinate Judge. Consequently it was argued that no application for attachment of other non-mortgaged properties could be entertained at this stage because it could not be said with any certainty that the decree-holder would ever become entitled to a personal decree. The learned Subordinate Judge, however, held that he could order attachment of non-mortgaged properties before the decree-holder obtained a final decree, by reason of the provisions of order XXXVIII. rule 5.

(1) (1918) I.L.R., 46 Cal., 245.

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Order XXXVIII, rule 5 provides: "Where, at any stage of a suit, the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of the whole or any part of his property, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security."

The original suit was still undisposed of, as the decree-holder was entitled in certain circumstances to obtain a personal decree. That being so, he could, upon satisfying the court that he was entitled to such personal decree and that the defendant was disposing of the whole or part of his property or removing the same out of the jurisdiction in order to obstruct or delay the execution of the personal decree when obtained, ask for an order under order XXXVIII, rule 5. This view is in accordance with the view expressed by GREAVES, J., in the case of *Jogemaya Dassi v. Baidyanath Pramanick* (1). In our judgment the learned Subordinate Judge had jurisdiction to entertain the decree-holder's application.

In our view, however, the order passed by the learned Subordinate Judge cannot stand. From the terms of the order it is impossible for us to say that the learned Judge considered the matters which order XXXVIII, rule 5 of the Civil Procedure Code directs that he should consider. According to the order passed by him the learned Subordinate Judge heard counsel for each party and thereupon passed the order. There was an affidavit filed by the decree-holder, but the order makes no mention of it and therefore we are unable to say whether or not he considered the facts deposed to in that affidavit.

(1) (1918) I.L.R.. 46 Cal., 245.

He appears to have heard no evidence on behalf of either party and, as we have stated previously, to have decided the matter upon hearing arguments of counsel.

Before the learned Subordinate Judge could act under order XXXVIII, rule 5 he had to be satisfied that the present appellant was about to dispose of the whole or a part of his property or remove the same out of the jurisdiction in order to obstruct or delay the execution of the personal decree when obtained. Further, he had to be satisfied that the amount which would be realised upon sale of the remainder of the mortgaged property would not be sufficient to satisfy the decree-holder's claim. The learned Subordinate Judge does say indirectly that the sale of the remainder of the mortgaged properties would still leave about Rs.12,000 due and owing to the decree-holder, but we have no means of ascertaining how he arrived at this finding. Nowhere in the order does he say that he is satisfied that the judgment-debtor is about to dispose of the whole or any part of his property or to remove the same from the local limits of the jurisdiction of the court. In the absence of positive findings that there would be a sum due and owing to the decree-holder after the sale of the remainder of the mortgaged properties, and that the judgment-debtor was disposing of or removing or attempting to dispose of or remove the whole or any part of his property, this order cannot stand.

Further the learned Subordinate Judge, even if satisfied, that there would be a sum due and owing to the decree-holder after the sale of the mortgaged properties and that the judgment-debtor was attempting to delay and obstruct a possible execution by disposing of or removing his property, could not there and then pass an order attaching other properties of the judgment-debtor. If satisfied upon the above points the learned Subordinate Judge should have called upon the judgment-debtor to furnish security to produce and place at

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the disposal of the court, when required, the said property or the value of the same, or such portion thereof as might be sufficient to satisfy the decree, or to appear and show cause why he should not furnish such security. From the terms of the order it would appear as if the judgment-debtor was never called upon either to furnish security to produce and place at the disposal of the court the property concerned, or to appear and show cause why he should not furnish such security. The moment the learned Subordinate Judge was satisfied that there would be a sum still owing after the sale of the remainder of the mortgaged properties and that the judgment-debtor was disposing of his property he made an order attaching the properties mentioned in the application. This he could not do until he had called upon the defendant to furnish security to produce and place at the disposal of the court the property or called upon the judgment-debtor to show cause why he should not furnish security.

Having failed to comply with the requirements of order XXXVIII, rule 5, any order passed attaching the property cannot stand and must be set aside.

In our view the proper course to take in this appeal is to set aside the order and send the case back to the lower court to be heard and determined in the manner which we have pointed out. We therefore allow this appeal with costs, set aside the order of the learned Additional Subordinate Judge of Moradabad and send back the case to the court below to be determined according to law.

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and  
Mr. Justice Bennet*

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*Muhammadian law—Family custom at variance with Muham-  
madian law of succession—Converts to Muhammadanism—  
Family custom of following Hindu law of succession—Bengal,  
Agra and Assam Civil Courts Act (XII of 1887), section 37.*

Notwithstanding the provisions of section 37 of the Bengal, Agra and Assam Civil Courts Act, 1887, a family custom of succession being governed by the Hindu law, and not by the Muhammadan law, in the case of a Muhammadan family whose ancestors were converts from Hinduism several centuries ago, can be proved and will prevail.

In Islam itself there are several sects, and the law of inheritance is not identical for all. Section 37 of the Bengal, Agra and Assam Civil Courts Act cannot, therefore, be interpreted as laying down that any particular rules of Muhammadan law should be enforced. Obviously the section means that in matters of succession, inheritance, etc., the parties when they are both Muhammadans should be governed by their personal law. A family custom which affects the personal law of the parties, even though not in accordance with the strict Muhammadan law, can be allowed to be proved.

Dr. N. P. Asthana, for the appellant.

Mr. S. C. Das, for the respondents.

SULAIMAN, C.J., and BENNET, J.:—This is a plaintiff's appeal arising out of a suit for recovery of possession of a share in zamindari properties. The plaintiff is one of the daughters of Rohtan, who on his death left a widow Mst. Pana and a sister Mst. Umda. The plaintiff's case as put forward in the plaint was that the parties to the suit, namely Mst. Jaffo and her sister, the daughters of Rohtan, on the one hand, and the defendant Mst. Umda, the sister, on the other, were Thakurs by caste and were originally governed by the Mitakshara school of the Hindu law; that some time during the Muhammadan rule the ancestors of the plaintiff and the two defendants, in common with many other Thakurs, embraced the Muhammadan religion and came to be known as

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\*Appeal No. 41 of 1935, under section 10 of the Letters Patent.

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Malkhana Thakurs, but in matters of succession and inheritance as well as in many other matters continued to be governed by the Hindu law and are so governed up to this date. The plaint then went on to allege that for over centuries since their conversion they had been governed by the Hindu law in matters of succession and inheritance as well as many other matters, and that at any rate there existed a very ancient custom among the Malkhana Thakurs in matters of succession and inheritance as well as many other matters under which a sister cannot inherit her brother's property. The incidents of this custom of succession were enumerated in paragraph 5 of the plaint. It was then alleged in paragraphs 6 to 9 that when the plaintiff's ancestor Tunda died leaving a son Dalla and a widow Mst. Ram Kunwar, the son succeeded to the entire estate according to the above mentioned custom to the exclusion of the widow; that when Dalla died leaving a son, a widow, his mother and a daughter, the son succeeded in accordance with the custom to the entire estate to the exclusion of the other three females. It was alleged in paragraph 12 that when Rohtan died about 12 years ago his wife Mst. Pana alone got the property by inheritance, to the exclusion of his daughters as well as other female relations. The plaintiff accordingly came into court on the allegation that under a family custom, which was common to the Malkhana Thakurs, sisters were excluded from inheritance.

The claim was resisted by the transferee from the sister Mst. Umda on the ground that the parties being Muhammadans were governed by the strict Muhammadan law of inheritance and no custom at variance with that law could be set up.

The trial court found that it was proved that Malkhanas were originally Hindus and had embraced Muhammadanism some centuries ago and that since then some of them had adopted all the rites and forms of

Islam including the system of succession and inheritance, but that others still retained their mixed Hindu-Muslim characteristics. It was further found that by custom and love of old ideas they have retained their old system of succession excluding the females from succession and inheritance, except in so far as the Hindu Shastras permitted them. But the learned Munsif noted that there were many villages occupied by Malkhana Thakurs and that even in one and the same village there lived Malkhanas some of whom were Muslims while others followed other practices. He came to the conclusion that the custom of exclusion of sisters was not established by the evidence.

On appeal the lower appellate court has come to a contrary conclusion. In the first place it held that, as had been done in previous cases, it was open to the plaintiff to prove the alleged custom even though it was contrary to the rule of Muhammadan law, and that in this particular case such a custom of exclusion of sisters had been established.

In second appeal a learned Judge of this Court came to the conclusion that the provisions of section 37 of the Bengal, Agra and Assam Civil Courts Act, XII of 1887, were specific and civil courts were bound to follow the Muhammadan law where the parties were Muhammadans. The learned Judge relied on the case of *Jumma v. Diwan* (1), and distinguished the case of *Rai Bahadur v. Bishen Dayal* (2). It is not quite clear from the judgment whether the attention of the learned Judge was drawn to the case decided by their Lordships of the Privy Council in *Muhammad Ismail Khan v. Sheomukh Rai* (3), the effect of which has to be considered.

If we were to look to the historical origin of the rule it may be noted that even in the Firmans of 1765 taken by the East India Company there was a provision that

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(1) (1900) I.L.R., 23 All., 20. (2) (1882) I.L.R., 4 All., 343.  
(3) (1912) 17 C.W.N., 97.

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"agreeable to the rules of Muhammad and the laws of the Empire" the Company should decide causes. Then followed Regulation II of 1772, section 277 of which enacted that "In all suits regarding inheritance, succession, marriage, and caste and other usages and institutions, the laws of the Quran with respect to Muhammadans and those of the Shastras with respect to Gentoos (Hindus) shall be invariably adhered to." The Regulating Act of 1773, under which the Supreme Court was established at Calcutta, also in section 17 directed that between the native inhabitants of Calcutta "their inheritance to lands, rents and goods and all matters of contract and dealings between party and party shall be determined in the case of Muhammadans by the laws and usages of the Muhammadans and in the case of Gentoos by the laws and usages of Gentoos to which they belong, and where only one of the parties shall be a Muhammadan or Gentoos, by the laws and usages of the defendant". In this, "usages" also came in.

In the Bengal Civil Courts Act (VI of 1871), also, section 24 provided: "Where in any suit or proceeding it is necessary for any court under this Act to decide any question regarding succession, inheritance, marriage or caste or any religious usage or institution, the Muhammadan law in cases where the parties are Muhammadans, and the Hindu law in cases where the parties are Hindus, shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished. In cases not provided for by the former part of this section, or by any other law for the time being in force, the court shall act according to justice, equity and good conscience." This section has been reproduced in the Bengal, Agra and Assam Civil Courts Act (XII of 1887), section 37. It is certainly significant that there is no specific reference to any customary law in addition to the Muhammadan and the Hindu laws mentioned therein. Of course the Hindu law in itself embodies rules of custom, but the Muhammadan law

does not. Similar enactments were passed as regards other provinces and it is certainly a fact that with the exception of the provinces of Bengal, Agra and Assam, everywhere else, e.g., the Bombay Presidency, the Madras Presidency, the Punjab and the North-West Frontier Province, Ajmer-Merwara, the Central Provinces and Burma, the corresponding sections of the Act make provisions for the enforcement of any custom having the force of law, while in the section in the Act applicable to these provinces there is no such specific reference.

The question came up for consideration before a Full Bench of this High Court in *Surmust Khan v. Kadir Dad Khan* (1). The Full Bench overruled a previous ruling of this Court in *Noor Jehan Begum v. Nuwab Mahomed Ali* (2), where, following an observation of their Lordships of the Privy Council in *Abraham v. Abraham* (3), the Court considered that a change of religion, although it releases the convert from obligation of the law under which his former religion placed him, does not necessarily place him under a new law of property, nor does it necessarily involve any change of the rights or relations of the party abjuring his old faith in matters relating to property, etc. It was pointed out by the Full Bench that the case before their Lordships of the Privy Council was a case of a convert to Christianity and that their Lordships had then remarked that "the profession of Christianity releases the convert from the trammels of the Hindu law, but it does not of necessity involve any change of the rights or relation of the converts in matters with which Christianity has no concern, such as his rights and interests in and power over property". The Full Bench came to the conclusion that it would be "contrary to all principle to rule that the successors of the original converts, themselves born Muhammadans, should be held bound for all time by the act of those original and so, as in the instance of the

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(1) (1866-67) N.W.P.H.C.R., (2) (1864) S.D.A., (N.W.P.), 4162.  
 (F.B.), 38.

(3) (1863) 9 Moo I.A., 199.

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females of the family in this case, be deprived of those rights to which they are entitled by the very religion of which they were born members". Their Lordships of the Privy Council then in a later case, *Jowala Buksh v. Dharum Singh* (1), distinguished the ruling in *Abraham v. Abraham* (2), and at pages 537-38 referred to two precedents in Macnaghten's Principles of Hindu Law where converts from the Hindu to the Muhammadan faith were held to be governed by the Muhammadan law so far as their subsequently acquired property was concerned. Their Lordships left the question open whether it is competent for a family converted from the Hindu to the Muhammadan faith to retain for several generations Hindu usages and customs, and by virtue of that retention to set up for itself a special and customary law of inheritance which, according to their Lordships, had never been definitely decided. The Full Bench ruling of this Court was however distinguished in *Raj Bahadur v. Bishen Dayal* (3), where it was held that the status of a Hindu or a Muhammadan to have the Hindu or the Muhammadan law made the "rule of decision" depends upon his being an orthodox believer in the Hindu or Muhammadan religion, and the mere circumstance that he may call himself or be termed by others a Hindu or a Muhammadan would not be enough. It is for him to establish his religion, and if he fails to establish his privilege to the application of that law, he must be relegated to that class of persons whose cases have to be decided under section 24 of Act VI of 1871. In that case the finding of the court below was that "The parties have failed to prove that they are either true Muslims or Hindus." The Bench accordingly applied the rule of justice, equity and good conscience. The question came again for consideration before another Bench in *Jammya v. Diwan* (4), and the Bench followed the Full Bench

(1) (1866) 10 Moo. I.A., 511.  
(3) (1882) I.L.R., 4 All., 343.

(2) (1863) 9 Moo. I.A., 199.  
(4) (1900) I.L.R., 23 All., 20.

ruling and laid down that the law which governs these provinces gives no openings where parties are Muhammadans to the consideration of custom, and that where the parties are Muhammadans the Muhammadan law shall form the rule of decision, except where such law has by legislative enactment been altered or abolished.

A similar question arose in *Ismail Khan v. Imtiaz-un-nisa* (1), where the parties were Baluchis by caste and originally residents of the Punjab, had from Sind migrated to the Punjab and from the Punjab they came to these provinces. They were not orthodox Muhammadans and were apparently not found to be strict observers of the Muhammadan religion. They set up a family custom of the exclusion of daughters. The Bench held that the Full Bench ruling in the case of *Surmust Khan* (2) was conclusive and that the rulings of this Court which had consistently followed the Full Bench decision for a number of years should not be disturbed.

The case was taken up in appeal before their Lordships of the Privy Council, and their Lordships' judgment is reported in *Muhammad Ismail Khan v. Sheo-mukh Rai* (3). The respondents were not represented but the judgment of the High Court was of course before their Lordships and section 37 of the Bengal Civil Courts Act was specifically referred to by the learned counsel for the appellants. Their Lordships after a consideration of the case thought that the suit should be remanded to the High Court to enable the parties to file evidence with respect to the issue as to whether any custom prevailed in the family depriving female issue of the right of inheritance in the presence of male issue. The custom which was the subject-matter of issue No. 3 was specifically a family custom and not a general custom overriding the Muhammadan law. It would, therefore, seem to follow that at least in a case where the parties had migrated to these provinces from

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(1) (1907) 4 A.L.J., 792.  
(3) (1912) 17 C.W.N., 97.

(2) (1866-67) N.W.P.H.C.R.,  
(F.B.) 38.



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Sindh or the Punjab where a custom contrary to the Muhammadan law had prevailed, and were setting up in these provinces a family custom depriving female issue of their right of inheritance in the presence of male issue, such a custom should be allowed to be proved by the courts in these provinces. The order of their Lordships remanding the case necessarily involves this decision and it must be taken as the settled law that a party who is setting up a family custom of such a kind should not be prevented from proving it and his evidence should not be shut out. The much wider question whether a universal custom in supersession of the Muhammadan law can also be allowed to be proved was neither raised nor decided in that case.

In another case of this Court, *Raja v. Allahdiya* (1), the evidence as regards the alleged custom was examined first by a Bench of this Court and then in Letters Patent appeal by a Full Bench. Ultimately it was found that the custom was not established. Two of the learned Judges did not consider it necessary to decide the general question whether or not any special custom can be set up in derogation of the Muhammadan law. But WALSH, J., expressed his own view that section 37 did not apply to a dispute between Muhammadans themselves, but that the section meant that the Muhammadans are governed by the Muhammadan law and the Hindus by the Hindu law, and that neither of them against their will should be subjected to the law of the other or to the English or any other law. He even went so far as to remark that a man is free to adopt for himself any special custom which he pleases.

In *Ali Asghar v. Collector of Bulandshahr* (2) a similar question was raised where a native of Palwal in the Gurgaon district of the Punjab rendered distinguished service to Government and was rewarded with the grant of a village in Bulandshahr. On retirement from service he retired to his native town and died there

(1) (1916) 33 Indian Cases, 114.

(2) (1917) I.L.R., 39 All., 574.

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leaving two widows, two daughters and a minor son. According to the custom of the Punjab and the local custom of Palwal daughters were not entitled to any share in the paternal inheritance in the presence of a son. The Bench held that evidence was admissible to prove the custom alleged by the plaintiff notwithstanding that such custom was contrary to the Muhammadan law. At page 585, BANERJI, J., referring to the judgment of their Lordships in *Muhammad Ismail Khan's* case (1), remarked: "We must, therefore, take it that in the opinion of their Lordships evidence is admissible to prove the alleged custom although it is at variance with the Muhammadan law." At page 595, PIGGOTT, J., observed: "The case was taken to the Privy Council in appeal and their Lordships directed evidence to be taken in proof of the alleged tribal or family custom. The court below has therefore rightly permitted the plaintiff to adduce evidence in proof of the custom set up by him and that evidence it is our duty to consider."

Now the Bengal, North-Western Provinces, and Assam Civil Courts Act of 1871 is called "An Act to consolidate and amend the law relating to civil courts." And the preamble states: "Whereas it is expedient to consolidate and amend the law relating to civil courts in Bengal, the North-Western Provinces, and Assam; it is hereby enacted as follows." The primary object of the Act, therefore, was to consolidate and amend the law relating to civil courts and not to modify the personal law of litigants who may seek the help of such courts. The language of section 37 also shows that there is a direction given to civil courts, where it is necessary to decide any question regarding succession, inheritance, etc., that the Muhammadan law in cases where the parties are Muhammadans shall form the rule of decision, except in so far as such law has by legislative enactment been altered or abolished. In other cases the court has to act in accordance with justice, equity, and good

(1) (1912) 17 C.W.N., 97.

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conscience. Now in Islam also there are several sects, and the law of inheritance is not identical for all. Section 37 cannot, therefore, be interpreted as laying down that any particular rules of Muhammadan law should be enforced. Obviously the section meant that in matters of succession, inheritance, etc., the parties when they are both Muhammadans should be governed by their personal law. It may be difficult to hold that the enforcement of a general custom contrary to the Muhammadan law and superseding it would not be repugnant to the provisions of section 37. But in view of the pronouncement of their Lordships of the Privy Council it must be held that a family custom which alters the personal law of the parties, even though not in accordance with the strict Muhammadan law, can be allowed to be proved.

If section 37 were to be interpreted in its strict sense various anomalies would follow. A person from Bombay who is subject to a customary law of inheritance may come to this province temporarily and die here. Can it be said that the courts are bound under section 37 to enforce the rule of Muhammadan law as between his heirs, notwithstanding the custom by which he was governed? There may again be emigrants from other places who, though settled down in this province, have not yet abandoned their previous personal law. It would be difficult to hold that the courts have no option but to ignore such law and enforce the strict Muhammadan law against their heirs. On the other hand, there may be considerable difficulty in holding that a person can by a mere choice lay down a new rule of succession contrary to the law of the faith to which he belongs, so as to bind his descendants generation after generation. But a family custom which has the force of law, and therefore modifies the personal law of the members of such family, can be pleaded. To this extent only the previous decisions of this Court must now be deemed

to have been overruled by implication by their Lordships of the Privy Council.

As already pointed out, the plaintiff in this case had actually set up a family custom under which the rule of succession under the Hindu law had governed the ancestors of the parties. No doubt she also alleged the same practice as prevailing among the Malkhana Thakurs; but that was by way of further strengthening her case. She enumerated instances in the family when the Muhammadan law of succession was not followed and the Hindu law was.

The question in this case is whether the family custom set up has been established by evidence or not. When admittedly the parties are Muhammadans, there is a heavy burden on the person to establish it. The burden is heavier still when the custom set up is contrary to any express text of the Quran. But Muslims in other provinces are known to be governed by special rules of inheritance not in accordance with the Muhammadan law.

In the present case the plaintiff has produced a number of judgments to show that it has been held by the courts in these provinces that among certain Malkhana Thakurs succession was governed by the Hindu law. In 1893 the Judge of the court of small causes, Agra, in a case from Mahaban in the district of Muttra, held that the parties in that case who were converts to Islam were not strictly Muhammadans, and applied the rules of justice, equity and good conscience, and enforced the customary law of inheritance which their ancestors had uniformly followed. The court, while conceding "that of course such members of the family community as may choose to follow the Muhammadan law by adhering to the rules of their faith, will have their law applied to them", held that such was not the case before him. In appeal that judgment was affirmed in view of the

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authority of this Court in *Raj Bahadur v. Bishen Dayal* (1). In another case in 1912 the Subordinate Judge, Agra, in appeal held that the Malkhana Thakurs, who were old Hindus converted to Muhammadanism, had in spite of such conversion retained many of their old usages and customs. Again in 1915 the Subordinate Judge, Muttra, in another case from Mahaban held that in view of the evidence the Malkhana Thakurs of village Suri did not follow the Muhammadan law of inheritance but followed the Hindu law. Lastly in 1930 the Munsif of Muttra held that the Malkhana Thakurs of village Tera were governed by the Hindu law of succession and not by the Muhammadan law. There was an earlier case of 1909 decided by the Munsif of Hathras in the district of Aligarh where he had declined to go into the question of custom on the ground that the Full Bench ruling in *Surmust Khan's* case (2) precluded such an inquiry. That case was decided before their Lordships' pronouncement.

In addition to this general kind of evidence, the plaintiff relied on the entry in the *wajib-ul-arz* of the village Undi, to which the parties belong, which after mentioning that the division of the property among the Malkhana Thakurs of the village was according to the "*bhai-bant* system" stated that where there are two widows left and one of them has children, those children would exclude the childless widow; and a childless widow succeeds to a husband with a limited estate only. It also contained a provision for the adoption of the son of the nearest collateral. It contained no mention of the succession of a sister or a daughter in the presence of sons. It is possible to argue that the word "*aulad*" was wide enough to cover both sons and daughters. But the provisions regarding the exclusion of the childless widow, the limited estate of a widow and the adoption were certainly contrary to Muhammadan law.

(1) (1882) I.L.R., 4 All., 343.

(2) (1866-67) N.W.P.H.C.R.,  
(F.B.), 38.

No doubt the entry as a record of custom may not be of great value; but it certainly shows what the practice in the village might have been or at any rate what the co-sharers, among whom presumably the predecessors in title of the parties to the suit also were, intended to be followed.

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The plaintiff also produced oral evidence and her eight witnesses cited numerous instances when in the presence of sons, a daughter or sister did not inherit. The defendant produced six witnesses who stated that the parties were Muhammadans, but they were not able to cite any clear instance where any Malkhana sister had succeeded along with her brothers. The finding of the lower appellate court as regards this point is, however, vague, for it has added "except where a family has become out and out Muslim". This exception may imply that there were instances in which Malkhana sisters succeeded along with their brothers. But the defendants' witnesses certainly had to admit that on many an occasion daughters had not inherited in the presence of sons, nor had widows. Of course the mere fact that a daughter or widow or mother does not take a share, but allows the whole estate to go to the son, is not by itself conclusive that there is a custom excluding females. Standing by themselves, such instances may not be weighty; but along with other evidence they certainly carry weight. The plaintiff also produced the khewats of the village, and these did not show that there had been any instance in which the Muhammadan law had governed the inheritance of a Malkhana Thakur.

As regards the instances in the family itself the lower appellate court has remarked: "In the very family in question there is evidence that when Tunda and Dalla died each had left a widow, but the widow in each case was excluded by the son. So was Mst. Umda herself on the death of her father, Dalla. It is to be noted that Umda did not claim any share until after the death of Rohtan's widow, i.e., Mst. Pana. The

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family is, therefore, clearly governed by the Hindu law of succession."

We take this finding to be that a family custom, under which succession is governed by the Hindu law, has been proved by sufficient evidence in the case. We have already enumerated the evidence. We are unable to say in this Letters Patent appeal that there was not sufficient legal evidence before the court below to come to this conclusion. The burden was undoubtedly very heavy on the plaintiff; but it was capable of being discharged. The lower appellate court has taken into account both oral and documentary evidence and has recorded a clear finding that the family of the parties is governed by the Hindu law of succession. We think that we must accept this finding as one of fact as it is not vitiated by any error of law. Had the evidence been legally insufficient to establish a family custom we would have intervened; but this is not the case here.

As the ruling of their Lordships of the Privy Council in *Muhammad Ismail Khan's* case (1) does not appear to have been cited before the learned Judge of this Court, and he was bound to follow the previous Division Bench ruling of this Court in *Jammya v. Diwan* (2), he has held that a custom could not be proved. For the reasons given above we must hold that it was open to the plaintiff to prove the family custom, and accordingly the finding of the lower appellate court must on this point be accepted.

The only other point that remains for consideration is whether the plaintiff is estopped from claiming the share on account of a compromise in the revenue court which was entered into on her behalf by her guardian. Mst. Umda, the sister, claimed a one-third share in the revenue court against the minor daughters of Rohtan. Their guardian conceded the whole claim and gave up the claim of the minors altogether. Apparently there was no consideration received for the

(1) (1912) 17 C.W.N., 97.

(2) (1900) I.L.R., 23 All., 20.

same, and no property was taken by way of compensation. There was no necessity for the guardian to give up the minors' claim at all. He need not have contested the application for mutation of names if he was not prepared to fight out the matter. No registered deed was executed. The main question before the revenue court was whose name should be entered in the revenue papers for fiscal purposes. No attempt was made by the guardian to obtain the sanction of the revenue court for entering into a compromise on behalf of the minors nor was he a certificated guardian of the minors. He was merely acting as their next friend. In these circumstances we cannot hold that the minors were bound by the act of the guardian, and that the plaintiff is now estopped from claiming a share because her guardian did not press for her rights in the revenue court.

The appeal is accordingly allowed, the decree of the learned Judge of this Court is set aside, and that of the lower appellate court restored with costs.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and  
Mr. Justice Bennet

SOBHA RAM (PLAINTIFF) *v.* TIKA RAM (DEFENDANT)\*

*Seduction of a wife—Enticing away a wife and attempt at seduction—Actionable wrong—Loss of society and services—Husband's suit for damages—Limitation Act (IX of 1908), articles 22, 120.*

The enticing away of a wife by a third person is an infringement of the absolute right of the husband to the benefit of the society and services of the wife, and the husband can maintain a suit for damages for such actionable wrong. It is immaterial that at that time the husband may have been away at another town; it is not the mere depriving of a husband for a day or two of the society of his wife which gives rise to the action, but the fact that the defendant has acted in a way towards the wife of the plaintiff which is an infringement of the plaintiff's rights under the contract of marriage. The case of a wife, therefore,

\*Appeal No. 50 of 1935, under section 10 of the Letters Patent.

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stands on a different footing from that of seduction of a daughter or a servant.

The husband's suit for damages is not governed by article 22 of the Limitation Act, not being a case of injury to the person of the plaintiff, but by article 120.

Messrs. *Baleshwari Prasad* and *G. S. Pathak*, for the appellant.

Mr. *B. Malik*, for the respondent.

SULAIMAN, C.J., and BENNET, J.:—This is a Letters Patent appeal from the decree of a learned single Judge dismissing the suit of the plaintiff. The plaintiff brought a suit for damages against the defendant on the ground that the defendant had enticed away the wife of the plaintiff, while the plaintiff was at Calcutta. The home of the plaintiff and of the defendant is in a village in tahsil Bah of Agra district, and the plaintiff alleged that his wife had been taken away by the defendant from that village to another village under the pretext that she would be carried away to Calcutta, and had been locked up in the house of the defendant, and the defendant had attempted to have sexual intercourse with her, and that an alarm being raised the defendant ran away. The plaintiff then came from Calcutta. The defence was a denial that the defendant had taken any part in the matter. The plaintiff in the first instance went to the criminal court under section 498 of the Indian Penal Code, and the defendant was convicted and sentenced to a fine of Rs.50. The two civil courts below have held that the facts alleged by the plaintiff were established, and have held that the enticement of the wife of the plaintiff is a ground for awarding damages to the plaintiff, and have awarded Rs.400 against the defendant. The learned Judge of this Court has referred to various rulings of English courts and various books on law which deal with the action of seduction, and especially that action in regard to the seduction of a daughter or a servant of the plaintiff. We are of the opinion that the question of the action of seduction of a daughter or a servant has no bearing

on the present case. In our opinion the husband has a right to the society of his wife, and the infringement of that absolute right by any other person is a tort. It does not matter that in this particular case the husband was at the time of the acts complained of in Calcutta, and that he was not present. It is not the mere depriving of a husband for a day or two of the society of his wife which gives rise to this action; it is the fact that the defendant has acted in a way towards the wife of the plaintiff which is illegal, and which he is not entitled to do.

In Halsbury's Laws of England, second edition, volume 16, it is laid down in paragraph 957: "If a third person, without just cause, persuades or entices a wife to live apart from her husband . . . that person commits an actionable wrong for which the husband is entitled to recover damages." In paragraph No. 958 it is stated: "A husband may also maintain an action for damages for the loss of the society or services of his wife against a third person in respect of any other wrongful act whereby he is deprived of the benefit of such society or services." The case of a wife stands on a different footing from that of a servant or daughter because there is a contract of marriage between the husband and the wife. The action of the defendant infringed that contract of marriage, and on account of the infringement of that contract the husband is entitled to damages. Learned counsel for the defendant objected to the wording of paragraph 8 of the plaint in which it was stated that "The above acts of the defendant were highly improper, against the etiquette of society and unlawful; the plaintiff was thereby greatly defamed and disgraced, was put to much shame, had to suffer humiliation, was put to considerable expense and worry and suffered great loss in business also in other ways." We consider that the wording of this paragraph is a very fair summary of the grounds on which a plaintiff may bring an action of this nature. Moreover, it is to be

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noted that the Penal Code provides in section 498 for a complaint to be brought against a person who entices away any married woman with intent that she may have illicit intercourse with any person. The action of the defendant was therefore a crime against the section and has been so found by the court. It is provided in the Criminal Procedure Code, section 199, that no court shall take cognizance of an offence under section 498 of the Indian Penal Code except upon a complaint made by the husband of the woman or certain other persons in his absence; that is, the criminal law recognizes that this particular offence of section 498 of the Indian Penal Code is an offence which is specially directed against a husband, and that a husband is a person aggrieved by such an offence. If, therefore, the matter is an offence against the husband in the penal law, it must also be a tort against that husband in civil law, which will entitle him to sue for damages. No ruling or authority has been shown to us by the learned counsel for the defendant which would entitle us to hold that the plaintiff would not be entitled to damages in a case like the present.

There has been some discussion in regard to the plea of limitation, and the learned single Judge was under the impression that article 22 of the Limitation Act would apply. That article prescribes a period of one year for compensation for any other injury to the person. Injuries to person mean physical injuries to the plaintiff. This is not a case for injury to the person of the plaintiff. We are of the opinion that the proper article is 120, the article for suits for which no period of limitation is provided elsewhere in the schedule, and the period for that article is six years. The suit was brought well within that period and therefore it is not barred by limitation.

For these reasons we allow this Letters Patent appeal with costs throughout and restore the decree of the lower appellate court.

*Before Mr. Justice Thom and Mr. Justice Rachhpal Singh*

NAGESAR RAM (JUDGMENT-DEBTOR) *v.* RAJNET RAM AND  
ANOTHER (DECREE-HOLDERS)\*

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*Civil Procedure Code, order XXI, rules 18, 20—Cross decrees—*

*Set off—Mortgage decree for sale can not be set off against a simple money decree.*

A mortgage decree for sale is not a decree for payment of money and can not be set off, under order XXI, rule 18 of the Civil Procedure Code, against a simple money decree. All that rule 20 lays down is that the provisions of rules 18 and 19 shall apply to cross mortgage decrees, i.e. if two contending parties hold mortgage decrees against each other, then they will be able to set off the decrees one against the other; and nothing in rule 20 warrants the view that a mortgage decree can be set off against a simple money decree. The decree-holders, respectively, of the two decrees do not fill the same character, and therefore, according to rule 18(3)(a), there can be no set off.

Mr. *Shah Jamil Alam*, for the appellant.

Mr. *Shiva Prasad Sinha*, for the respondents.

THOM and RACHHPAL SINGH, JJ.:—This is a judgment-debtor's appeal arising out of execution proceedings.

The opposite party holds a simple money decree against Nagesar Ram, judgment-debtor, and has put that decree into execution. The appellant holds a mortgage decree against the opposite party. The only question for determination in this case is whether a mortgage decree can be set off against a simple money decree obtained by the opposite party against the appellant.

Rule 18, order XXI of the Code of Civil Procedure enacts that where application is made to a court for the execution of cross decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such court, then (a) if the two sums are equal, satisfac-

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\*First Appeal No. 36 of 1935, from an order of Muhammad Zamir Uddin, Subordinate Judge of Ghazipur, dated the 2nd of February, 1935.

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tion shall be entered upon both decrees; and (b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum. One of the essential conditions is mentioned in clause (3), sub-clause (a) which runs as follows: "The decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits."

It will be seen that the rule relates to decrees for payment of money. As we have already pointed out, in the case before us we have a decree for payment of money on the one side and a decree obtained on the basis of a mortgage deed for sale on the other. It cannot be said that a decree for sale obtained on foot of a mortgage is a decree for payment of money.

Rule 20, order XXI enacts that the provisions contained in rules 18 and 19 shall apply to decrees for sale in enforcement of a mortgage or charge.

Learned counsel for the appellant has contended before us that in view of the provisions of rule 20, order XXI of the Code of Civil Procedure his case comes within the definition of a decree for money and he is entitled to set it off against the decree of the opposite party. We find ourselves unable to agree with this contention. It appears to us that all that rule 20 lays down is that the provisions of rules 18 and 19 shall apply to cross mortgage decrees, i.e., if two contending parties hold mortgage decrees against each other then they will be able to set off the decrees one against the other. We see nothing in the provisions of rule 20 which will warrant us in holding that a decree obtained on the foot of a mortgage becomes a decree for payment of money and therefore it can be set off against a simple money decree held by the opposite party.

Learned counsel for the appellant cited before us several cases but we will make a reference to some of them. The first case on which he relied is the case of *Nagar Mal v. Ram Chand* (1). We have read the judgment passed in this case and we do not think that the Court in that case laid down that a mortgage decree is a decree for money and can be set off against a simple money decree. The head-note of that case is somewhat misleading. The learned Judges who decided the case never laid down a definite proposition as mentioned in the head-note. It appears from a perusal of that judgment that it was argued before their Lordships that a decree for sale for enforcement of a charge against immovable property could be set off against a simple money decree, and reliance was placed on the provisions of rule 20, order XXI of the Code of Civil Procedure. The question was not decided. Their Lordships set down the contentions raised on both sides and did not decide the matter one way or the other, and so it cannot be said that this case is any authority for the proposition put forward by learned counsel for the appellant before us. The other case relied upon is the case of *Sobha Ram Gopal Rai v. Tara Chand* (2). In our opinion this is no authority for the contention put forward before us. All that was decided in that case was that as there were applications for execution of both the decrees, order XXI, rule 18, applied and the court could set off the smaller amount due from *B* against the larger amount due to him from *A*, although *A* had already secured attachment of *B*'s decree against himself. There is nothing in this judgment to show that the learned Judges were called upon to decide the question as to whether or not a decree obtained on the basis of a simple mortgage deed for sale could be set off against a simple money decree. We may point out that the decisions of the Madras High Court on this question are certainly in favour of the contention which

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(1) (1910) I.L.R., 33 All., 240.

(2) A.I.R., 1929 All., 502.

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has been advanced before us by learned counsel for the appellant. We may refer to the latest decision of the Madras High Court in *Venkata Reddi v. Dorasami Pillai* (1). In that case it was decided by the learned Judges that a mortgage decree could be set off against a simple money decree. We respectfully dissent from the view taken by the learned Judges of the Madras High Court on the point in question. In this connection we may refer to a case of our own Court, *Sheo Shanker v. Chunni Lal* (2). In that case one of the contending parties had a simple money decree and he applied for its execution and on the other side the opposite party had put in an application for executing a mortgage decree for foreclosure. The learned Judge who decided the case held that under order XXI, rule 18 of the Civil Procedure Code there could be no set off inasmuch as the applicants filled distinct characters in the two cases. At page 781 the learned Judge made the following observations: "Prior to the passing of Act V of 1908 (the present Code of Civil Procedure) it had been held that a decree for sale is not a decree for payment of money within the meaning of sections 230 and 246 of the Code of Civil Procedure. This point has been cleared up by rule 20 of this order. The provisions of rules 18 and 19 apply now to decrees for sale as well. Rule 20, however, does nothing more than make the provisions contained in rules 18 and 19 applicable to decrees for sale. The two decrees proposed to be set off against each other must come within the provisions of these rules before they can be so set off." In our opinion, if we may say so with respect, this is the correct view to take. If the legislature had intended that the provisions of rule 18 should govern cases in which there is a mortgage decree on the one side and a decree for payment of money on the other hand, that intention would have been made clear by stating in rule 18 that

(1) (1932) 63 M.L.J., 722.

(2) (1916) 14 A.L.J., 776.

the provisions of that rule will be applicable to cases of this description.

Learned counsel for the appellant contended before us that rule 20, order XXI of the Civil Procedure Code supported his contention. We are unable to agree with this argument. In our opinion, the provisions of rule 20, order XXI are opposed to his contention. It will be noticed that the heading given to rule 20, order XXI, is, "Cross decrees and cross claims in mortgage suits." Rule 20, order XXI enacts: "The provisions contained in rules 18 and 19 shall apply to decrees for sale in enforcement of a mortgage or charge." We may point out that this rule is new and was added in the Code of Civil Procedure for the first time when the new Code of 1908 came into force. It appears to us that the reason for enacting this rule was that the legislature considered it desirable to make provisions under which one mortgage decree or a decree for the enforcement of a charge could be set off against another decree of the same description. So rule 20 was enacted which made the provisions of rules 18 and 19, which related to a claim arising out of "Decrees for payment of money", applicable to decrees for sale in enforcement of a mortgage or charge. If a mortgage decree can be set off against a decree for payment of money under the provisions of rule 18, order XXI, then it is not easy to understand the reasons for enacting rule 20, order XXI of the Civil Procedure Code. It has also to be remembered that in every decree for payment of money there is a personal liability, whereas in every decree for sale in enforcement of a mortgage or charge there may be no personal liability. In enforcing a claim on the basis of a decree for payment of money the decree-holder is entitled to ask for the arrest of his judgment-debtor. On the other hand, in a mortgage decree the mortgagor is not personally directed to pay any sum of money but is only given an option to pay if he wishes to save the property in which he is interested. The decree-holders,

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in such cases, do not fill the same character and therefore rule 18 can have no application. The interpretation which we place on rule 20 is that it permits one mortgage decree to be set off against another mortgage decree; but it has no application to a case where one party has a decree for payment of money and the other a decree for sale or for enforcement of a charge. We are further of opinion that in order to attract the provisions of rule 18, order XXI, it is necessary that the decrees sought to be set off against each other must be decrees for payment of money.

This being our view, we are of opinion that the order passed by the court below is correct. We accordingly dismiss the appeal with costs.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and  
Mr. Justice Bennet

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RAM SARUP (DECREE-HOLDER) v. SAHU BHAGWATI  
PRASAD AND ANOTHER (OBJECTORS)\*

*Limitation Act (IX of 1908), section 19—Acknowledgment—  
“Person through whom he derives title”—Acknowledgment  
by mortgagor not binding on a mortgagee who derived title  
prior to the acknowledgment—Transfer of Property Act (IV  
of 1882), sections 52, 74, 92—Subrogation—Third mortgagee  
paying off first mortgage after second mortgagee’s decree—  
Fresh period of limitation does not accrue—Lis pendens—  
Vakalatnama giving name of one vakil but signed by another  
who was in fact appointed—Formal defect immaterial.*

Where there is an acknowledgment by a mortgagor, that acknowledgment can only bind a mortgagee who derives his title subsequent to the acknowledgment, but it can not bind a mortgagee who derives title prior to the acknowledgment. The words, “person through whom he derives title”, in section 19 of the Limitation Act mean a person through whom he has derived title after the date of the acknowledgment. So, an acknowledgment of the first mortgage contained in the deed of third mortgage can not operate as against the second mortgagee.

\*Second Appeal No. 247 of 1934, from a decree of Lachhman Prasad, Additional Subordinate Judge of Bijnor, dated the 4th of November, 1933, reversing a decree of Raghunandan Saran, Munsif of Nagina, dated the 8th of May, 1933.

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The payment by a third mortgagee of the amount due on the first mortgage to the first mortgagee subrogates him to the rights of the first mortgagee but does not give him a fresh period of limitation, as from the date of such payment, for enforcing the rights under the first mortgage.

Where, after the second mortgagee has obtained a decree for sale on his mortgage, a third mortgage is made and the third mortgagee pays the amount due on the first mortgage to the first mortgagee, the third mortgagee is prevented by section 52 of the Transfer of Property Act from claiming priority in respect of the first mortgage as against the second mortgagee decree-holder.

Where a vakalatnama was signed by the vakil who was intended to be appointed by the client, and such vakil acted for the client, but it was found that the body of the vakalatnama did not contain the name of this vakil but that of another vakil, it was held that this formal defect was immaterial and that the vakil had validly acted on behalf of the client.

Messrs. *G. S. Pathak* and *R. N. Sen*, for the appellant.

Mr. *Vishwa Mitra*, for the respondents.

SULAIMAN, C.J., and BENNET, J.:—This is an execution second appeal by a decree-holder, Ram Sarup. The facts are somewhat complicated and are as follows. Jagannath and his son, Ram Sarup, made three simple mortgages as follows:—(1) on the 26th of July, 1917, in favour of Gopi Nath, (2) on the 16th of November, 1922, in favour of Raghubir Saran, (on this mortgage a decree has been obtained by Raghubir Saran on the 11th of January, 1926) and (3) on the 28th of July, 1926, in favour of Sahu Bhagwati Prasad and Sahu Jagdish Prasad, the respondents. One point to be noted is that the mortgage in favour of the respondents was executed at a date subsequent to the decree on the second mortgage, which is now the decree under execution. It is, therefore, claimed that the provisions of section 52 of the Transfer of Property Act apply in favour of the decree-holder. The third mortgage contained a provision that Rs.2,100 were left for payment to Gopi Nath on the first mortgage, and on the 29th of July, 1926, the same was actually paid to Gopi Nath,

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amounting to Rs.2,151-14 in full discharge of his first mortgage, by the mortgagee of the third mortgage. The present appellant made an application on the 13th of January, 1931, for substitution of his name, and on the 14th of March, 1931, substitution was made. He then made an application on the 10th of November, 1932, for execution. One point which has been held against him by the lower court is that in these applications there was no proper vakalatnama, because the vakalatnama bore the name of a certain vakil and that vakil was not in fact the one who made the application, but another vakil made the application. The vakalatnama was signed by the appellant and also by the vakil who made the application. It was apparently by an error that the name of another vakil remained in the document. Under order III, rule 4(1) it is provided that no pleader shall act in any case unless he has been appointed for the purpose by such person by a document in writing and signed by such person. The question is whether actually this vakil was appointed by the appellant. The document in question was signed by the appellant, and we are satisfied that he intended to appoint the vakil who made the application. The mere mistake that the name of some other vakil remained in the body of the document does not make any difference. In actual fact the vakil in question has been acting throughout for the appellant, and it is a mere quibble to hold, as the learned Subordinate Judge has held, that he was not entitled to make this application. There have been recent pronouncements of this Court to the effect that where the vakil is actually intended by a party to act on his behalf, and does so act, formal defects of this nature are of no importance. This was the main ground on which the lower court has held against the appellant. We hold that the decision of the lower court was wrong.

A further point which was raised by the respondents against the claim of the appellant for execution was that

the respondents were entitled to priority on account of their payment of Rs.2,151-14 to the first mortgagee. This question has been very briefly dealt with by the court below in a dozen lines, and the court considered that the claim of the respondents was well founded. The matter is one of considerable difficulty and cannot be so briefly disposed of. On the 2nd of February, 1931, the respondents brought a suit on the third mortgage. This mortgage had no doubt the item of consideration of Rs.2,100 for the first mortgage, but the suit was based on the third mortgage and not at all on the first mortgage. The second point which is to be noted is that the respondents did not implead Raghubir Saran, the mortgagee on the second mortgage in suit, although he had actually obtained a decree on the second mortgage; nor did they implead the appellant to whom the decree had been sold on the 30th of December, 1930, and who had the substitution made for his name on the 14th of March, 1931.

We consider that it was a great defect in the suit that Raghubir Saran or his transferee was not made a party. The decree was passed in favour of the respondents on the 20th of July, 1931, the decree being against the mortgagor only. In execution of this decree the respondents had the property put up to sale, and the respondents purchased the property themselves on the 15th of October, 1932; and on the 19th of July, 1933, the respondents obtained possession through the court. The respondents, therefore, prayed that at the time of the execution application which was made on the 10th of November, 1932, they were the purchasers by auction sale, although they had not obtained possession until a date subsequent to the judgment of the Munsif in this case, which was on the 8th of May, 1933. Now much argument has been made as to the fact of the payment by the respondents on the 29th of July, 1926. On behalf of the appellant it is claimed that the whole transaction of mortgage No. 3 of the 28th of July, 1926,

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cannot have any effect on his rights because under section 52 of the Transfer of Property Act he can claim that the transfer by the mortgagor made subsequent to the decree of the 11th of January, 1926, in favour of Raghubir Saran is a transfer which cannot affect the rights of the decree-holder under that decree. On the other hand the respondents claim that they are persons who are subrogated under the provisions of section 92 of the present Transfer of Property Act, or under the provisions of section 74 of the Transfer of Property Act as it stood at the time of their purchase on the 29th of July, 1926. Learned counsel for the respondents argued that on that date, 29th of July, 1926, they paid off the prior mortgage of the 26th of July, 1917, and therefore acquired rights of subrogation under that mortgage. Now what were those rights? Under section 74 as it stood at that date it was provided "that the subsequent mortgagee shall on obtaining such receipt acquire in respect of the property all the rights and powers of the mortgagee as such to whom he has made such tender". The provision in the present section 92 for subrogation is practically the same. Learned counsel argued that this right which he acquired in 1926 should extend for a period of 12 years from that date. We are of the opinion that this contention is not correct, and that the language of section 74 limits him to the rights and powers of the mortgagee of that date. Now the mortgage of the 26th of July, 1917, provided that payment should be made within one year, and the period of 12 years' limitation from that year would terminate on the 26th of July, 1930. The rights acquired, therefore, terminated on that date in 1930, and cannot be taken to extend the period of 12 years from 1926. No suit was brought by the respondents on the first mortgage, and therefore in our opinion their rights under that mortgage have become time barred.

An argument has been addressed to us at considerable length to the effect that time would be extended by

an acknowledgment made by a mortgagor, the acknowledgment in question being the execution of the mortgage of the 28th of July, 1926, in favour of the respondents as that deed contains an admission that Rs.2,100 were due to Gopi Nath. The question which arises for consideration is whether a mere acknowledgment by a mortgagor can operate under the provisions of section 19 to extend limitation not only against himself, but also against a puisne mortgagee who has acquired his puisne mortgage prior to the acknowledgment in question. In this connection a distinction is to be drawn between rulings under section 20 where there is a payment by the mortgagor and rulings under section 19 where there is an acknowledgment by the mortgagor. The language of these two sections is different; and the considerations to which they give rise are also different. In section 20 it is provided that where there is a payment by the person liable to pay the debt, that is sufficient to extend the period of limitation. The section presumes that a person will not make a payment unless he has a legal liability to make the payment. In section 19 the provisions are that "an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed or by some person through whom he derives title or liability". The acknowledgment has not been made by the appellant but it has been made by his mortgagor. It cannot be said that the acknowledgment by the mortgagor is one by a person through whom the appellant derives title or liability. The title or liability of the appellant arises from the mortgage executed by the mortgagor in favour of Raghbir Saran on the 16th of November, 1922. It was on that date and by virtue of that mortgage that the title or liability of the appellant arose. He has had no further connection since that date with the mortgagor and it cannot be said that he derived title from the

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mortgagor by any transaction subsequent to 1926. We consider that the plain language of section 19 means that the person through whom he derives title or liability must be a person through whom he has derived title or liability at the time of the acknowledgment. Now it was four years prior to the acknowledgment that he derived his title or liability. The mortgagor in 1926 was not the person through whom the appellant derived title or liability. He was a person through whom the appellant had derived title and liability four years previously. We are of the opinion that this distinction is essential to section 19 and that the acknowledgment by the mortgagor in 1926 cannot in any way extend limitation against the appellant who derived his title from that mortgagor in 1922.

We now come to the case law on the subject. In the years 1918 and 1919 there were two rulings of this Court on this subject, but as these rulings were of a period within about nine months it is apparent that the learned Judges who made the later ruling did not have the benefit of seeing the earlier ruling. The earlier of these rulings was of August, 1918, in *Roshan Lal v. Kanhaiya Lal* (1), by a Bench composed of PIGGOTT and WALSH, JJ. In that case it was held that a payment by a mortgagor did save limitation in case of a claim against a subsequent mortgagee; but a distinction was drawn by the Bench on the difference between an acknowledgment under section 19 and a payment under section 20, and the Bench took the same view which we have enunciated. We then come to the later case of the 6th of May, 1919, in *Arbindakeb Rai v. Jageshar Rai* (2). One member of the Bench was the same, WALSH, J., and the other member was STUART, J. The finding of the Bench was extremely brief. It was a case where there was an acknowledgment, and the Bench held that the acknowledgment was sufficient against the mortgagee, although the mortgagee in question had obtained his mortgage

(1) (1918) I.L.R., 41 All., 111.

(2) (1919) 17 A.L.J., 763.

prior to the acknowledgment. There was no discussion of the case law on the subject. There was some reference to a Calcutta case, not by name, which was under section 20 of the Limitation Act; and that section, as we have shown, is essentially different in regard to this point from section 19.

We now turn to some English rulings, which have been cited by the courts in India, and which have been relied on by the decision of this Court in 1918. One of the earliest of these rulings is *Bolding v. Lane* (1), in 1863, by WESTBURY, L.C., and that case was directly in point, and he held that an acknowledgment by a mortgagor does not preclude a puisne mortgagee from relying on limitation where the mortgage had been taken previous to the acknowledgment. This ruling has been quoted with approval in subsequent rulings, one of which is *Lewin v. Wilson* (2), where there is a discussion on this point. These are rulings of 1863. On page 645 a distinction was drawn between the case by their Lordships of the Privy Council and the case of *Chinnery v. Evans* (3). That was a case of payment and it was pointed out that a payment raised different considerations from an acknowledgment.

From the weight of the English cases where the law is similar, and of the ruling of 1918 of this Court, we consider that the proposition is well established that where there is an acknowledgment by a mortgagor that acknowledgment can only bind a mortgagee who derives his title subsequent to the acknowledgment, but it cannot bind a mortgagee who derives title prior to the acknowledgment. We, therefore, think that the claim of the respondents that the period of limitation on their rights under the first mortgage would be extended by the acknowledgment contained in the third mortgage is a claim which is not established. Therefore in our view the respondents have got no rights left

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(1) (1863) 1 De G.J. & S., 122. (2) (1886) 11 App. Cas., 639.

(3) (1864) 11 H.L.C., 115.



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under the first mortgage, and they are persons who are deprived of any claim they might have had against the appellant because the provisions of section 52 of the Transfer of Property Act are against them. We, therefore, consider that the objection which the respondents have made in regard to their payment of Rs.2,151-14-0 on the 29th of July, 1926, cannot be sustained. Therefore we allow the appeal, set aside the order of the lower appellate court, and restore the order of the Munsif, and we dismiss the objection of the respondents with costs throughout.

### REVISIONAL CRIMINAL

*Before Mr. Justice Allsop*

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EMPEROR v. KUNJ BEHARI DAS AND OTHERS\*

*Criminal Procedure Code, section 145, clauses (4), (9)—Summoning of witnesses named by a party—Discretion of court—Duty of court to summon witnesses, not imperative in all kinds of cases—Revision—Substantial justice.*

Sub-section (4) of section 145 of the Criminal Procedure Code has to be read with sub-section (9), which leaves it entirely to the discretion of the Magistrate, in a proceeding under that section, whether he will or will not summon any witness or witnesses, on the application of either party.

There is no general duty upon a court in all kinds of proceedings to issue process to compel the attendance of witnesses desired by the parties; special rules are laid down in the Criminal Procedure Code in this respect according to the nature of the inquiry with which the Magistrate is dealing. Having regard, obviously, to the fact that a proceeding under section 145 is a summary proceeding about the possession of parties, sub-section (9) makes it discretionary to summon or not to summon witnesses.

Even if there were any doubt on this question of law, there would be no ground for interference in revision where the order of the court under section 145, which had been passed

\*Criminal Revision No. 1043 of 1935, from an order of K. K. K. Nayar, Sessions Judge of Muttra, dated the 13th of November, 1935.

after a personal inspection and local inquiry, was substantially just.

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Mr. *M. L. Chaturvedi*, for the applicants.

Mr. *K. N. Agarwala*, for the opposite party.

The Assistant Government Advocate (*Dr. M. Waliullah*), for the Crown.

ALLSOP, J.:—This application in revision arises out of proceedings under section 145 of the Criminal Procedure Code. The present applicants claim to be the managing committee or trustees of a certain temple. They say that the original mahant died some time at the end of the year 1933 and that they appointed Radha Raman Das as his successor on the 4th of December, 1933. Radha Raman Das continued to be mahant till the 28th of July, 1935, when he executed a document relinquishing that position. On the 29th of July, 1935, Radha Raman Das sent a telegram to the District Magistrate and made a report to the police that he had been forcibly dispossessed. On the 3rd of August, 1935, he made the application under section 145 of the Criminal Procedure Code which has given rise to these proceedings. He said that he had been compelled by force to execute the deed of relinquishment. A police inquiry was then held and a report was made that there was a danger of a breach of the peace. The Magistrate called upon the parties on the 31st of August to put in their written statements. The written statements were filed on the 2nd of September. The present applicants made an application on the 3rd of September asking that the Magistrate should issue process to summon 12 or 13 witnesses. The Magistrate on that date said that he would go and make a local inquiry on the 4th of September. He did this early on the morning of the 4th and he afterwards passed an order holding that Radha Raman Das had been in possession of the property up to the 28th of July, 1935, and that he had been forcibly dispossessed. He directed that Radha

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Raman Das should be placed in possession of the property. The main complaint of the applicants now is that they were not given an opportunity to produce their witnesses. No order was passed on their application of the 3rd of September, directing that the witnesses were to be summoned, and orders were passed without the examination of those witnesses. I have been referred to the case of *Emperor v. Chakrapan* (1). A learned Judge of this Court remarked in that case that clause (4) of section 145 of the Criminal Procedure Code threw upon the Magistrate a duty to summon such witnesses as might be mentioned to the court by either party. As this application before me is an application in revision I do not consider that the applicants can require me to adjudicate upon this question of law, but I am prepared to say that I have considerable doubt whether I should be prepared to follow the ruling in *Chakrapan's* case (1). The attention of the learned Judge who decided that case was apparently not drawn to the provisions of sub-section (9) of section 145. This sub-section is in the following terms: "The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing." It seems to me that this sub section leaves it entirely to the discretion of the Magistrate whether he will or will not summon any witness or witnesses. The argument placed before me seems to rest upon the supposition that in every case it is the duty of the court to issue process to summon any witnesses whom either party wishes to summon. I do not think that there is any justification for assuming that any such principle exists. The duty of the court in the matter of summoning witnesses is set forth differently according as the matter before the court is an inquiry into a case triable by a court of session or a summons case or a warrant case, and the duty varies

(1) (1929) I.L.R., 52 All., 91.

as between the prosecution and the accused. Under section 208 of the Criminal Procedure Code, in an inquiry into a case triable by the court of session, if the prosecution apply to the Magistrate to issue process he shall issue such process, unless for reasons to be recorded he deems it unnecessary to do so. When the accused is called upon for his defence he is required to furnish a list of witnesses. The Magistrate may in his discretion summon and examine any witness named in the list in his own court. If the accused is committed to the court of session the Magistrate is bound to summon the witnesses included in the list unless he thinks that they have been so included for the purpose of vexation or delay or for defeating the ends of justice, and he must give the accused person an opportunity of showing that they were not so included. During the trial of summons cases the duty of the Magistrate is much the same as it is in proceedings under section 145 of the Criminal Procedure Code. In section 244(2) it is said that the Magistrate may, if he thinks fit, on the application of the complainant or accused, issue a summons to any witness directing him to attend or to produce any document or other thing. It is obvious to my mind that in such petty cases it is entirely a matter for the discretion of the Magistrate whether he will summon witnesses or not. Then in the course of the trial of warrant cases the Magistrate shall summon such witnesses for the prosecution as he thinks necessary and if the accused applies to the Magistrate to issue any process for compelling the attendance of any witness the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. I think it is obvious that there is no general duty upon a court in any proceeding to issue process to compel the attendance of witnesses. Special rules are laid down according to the nature of the inquiry with which the Magistrate is dealing. In

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these circumstances I cannot see how it can be said in view of the wordings of sub-section (9) of section 145 that the Magistrate is bound to issue process to compel the attendance of witnesses. The real question in this matter before me is whether any serious and substantial injustice has been done to the applicants. There can be no doubt to my mind on the written statement put in by the applicants and a document, which is not in evidence but which has been read to me in the course of arguments and on which the applicants rely, that Radha Raman Das was in possession of the property in dispute up to the 28th of July, 1935. From the written statement it appears that Radha Raman Das's predecessor, the previous mahant, was in possession of the property and that after his death it was managed by a committee of persons interested in the property. Thereafter Radha Raman Das was appointed mahant. It is true that he executed the document to which I have referred above, namely the document which has been read to me and upon which the applicants rely, and that he said in that document that he would manage the property in certain ways, that is, that he would deal with it in accordance with the views of the majority of the committee and that he would appoint a certain person to carry out the actual management under his supervision and that that person should keep accounts which should be produced and so forth. I do not think that this implies that the property still vested in the committee and not in Radha Raman Das. The question after all is not a legal question whether Radha Raman Das is to be considered to have been in possession of the property merely as an agent or in his own right. The question is who was actually in physical possession. There seems to be no real doubt that Radha Raman Das in his capacity as mahant was in possession up to the 28th of July, 1935. Then it is urged that he delivered possession voluntarily when he executed the deed of relinquishment. In view of the fact that he made immediate protests on the very

next day, the 29th of July, and that since then there has been a dispute as to the right of possession, I think it is extremely improbable that Radha Raman Das could have voluntarily relinquished possession on the 28th of July, 1935. This is after all not a final adjudication of the rights of the parties. An order under section 145 is passed as the result of a summary proceeding about the possession of the parties and the aggrieved party can always have recourse to the civil court to establish his right. The real dispute between the parties in the present case is whether the present applicants in revision are entitled to eject Radha Raman Das from his position as the mahant of the temple. That is a question which can properly be agitated only in a civil court. It seems to me that the order of the Magistrate was substantially just and there is certainly no ground to interfere with it in revision. The application is rejected.

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### APPELLATE CIVIL

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and  
Mr. Justice Bennet*

JOHN BROTHERS (OPPOSITE-PARTY) v. OFFICIAL LIQUIDATOR, AGRA SPINNING AND WEAVING MILLS CO. (APPLICANT)\*

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*Companies Act (VII of 1913), section 188—"Purchaser"—  
"Other person from whom money is due"—Scope of section  
—Money due from a person upon a contract given by the  
liquidator to him for working the mills of the company in  
liquidation—Order for payment of such money to the  
liquidator or into Bank—Execution of such order—Jurisdiction.*

Where with the approval of the court a contract was given by the official liquidator to a third person for the working of the mills of the company in liquidation, and according to the terms of the contract a certain sum fell due from such person, and upon the application of the official liquidator the com-

\*Appeal No. 146 of 1934, under section 10 of the Letters Patent.

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pany Judge ordered that person to pay the amount to the Imperial Bank of India and directed that, in default, the order be executed in the manner of a simple money decree; it was held that the company Judge had no jurisdiction under the Companies Act to pass any such order.

Disputes which may arise with third parties out of transactions entered into by the liquidator with them are foreign to the jurisdiction of the court in winding up proceedings.

Section 188 of the Companies Act did not give jurisdiction to the company Judge to pass the order in question. That section means that where an order can be passed against a person to pay to the liquidator, it may be passed against the person to pay to the Bank. An order to pay to the liquidator can be passed against a contributory, or trustee, or receiver or such other person as is mentioned in section 185. Therefore, unless a person comes under section 185, the company court has no jurisdiction to pass an order against him under section 188 to pay any sum of money to the Bank.

The word "purchaser" in section 188 must be taken to refer to the word "contributory" which immediately precedes it, and it means the purchaser of the interest of a contributory. The words, "or other person from whom money is due", in the section have reference to a person from whom money is due under section 185, so far as it is intended that an order enforcing payment should be made, but under section 188 it is open to the court to order the payment to be made to the Bank instead of to the liquidator.

Messrs. *B. E. O'Connor* and *B. Malik*, for the appellant.

Messrs. *P. L. Banerji*, *Akhtar Husain Khan* and *I. B. Banerji*, for the respondent.

SULAIMAN, C.J., and BENNET, J.:—This is a Letters Patent appeal by Messrs. John Brothers of Agra against the order of a learned company Judge of this Court, dated the 8th of September, 1934. The order is that a sum of Rs. 51,266-2-2 should be deposited by Messrs. John Brothers in the Imperial Bank of India at Agra, in the account of the Agra Spinning and Weaving Mills Co., Ltd., within one week from the date of the order, this being the entire amount due to the company on account of spinning charges. A copy of the order was sent to the District Judge with the

directions that if the amount is not paid within a week from the date of the order, immediate execution of the order must be issued, in the manner of a simple money decree under the Code of Civil Procedure. The grounds of Letters Patent appeal allege that the learned company Judge had no jurisdiction to pass a decree and direct its execution, and that the order appealed against was illegal and was passed with material irregularity, and that the official liquidator could only file a suit for the realisation of the amount, and the procedure adopted was illegal.

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This matter arose from an application by the liquidator of the Agra Spinning and Weaving Mills Co., Ltd., dated the 31st of August, 1934, in which he pointed out that the learned company Judge had, on the 17th of August, 1934, granted time to Messrs. John Brothers to pay the charges, and that Messrs. John Brothers had not paid the charges and had on the 17th of August, 1934, executed a mortgage in favour of Govind Ram Ramnath of all their property. No special prayer was contained in this application, but merely a prayer for directions. Messrs. John Brothers filed a reply through their counsel explaining why they had made delay in payment of the charges. The circumstances which gave rise to this matter are as follows:

A contract was approved of by the court on the 21st of July, 1933, by which the liquidator entered into a contract with Messrs. John Brothers for the working of the mills in question. By that contract Messrs. John Brothers agreed to supply cotton and pay spinning charges as well as to pay the running expenses of the mills; and Messrs. John Brothers were to receive the produce of the mills as their property. The amount which Messrs. John Brothers had to pay by the 15th of each month would give a profit to the liquidator over and above the amount which the liquidator had to pay for the wages of the operators of the mills and other charges. It would thus be seen that in lieu of letting



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the mills to Messrs. John Brothers for a fixed rent the liquidator was making certain payments and relying on Messrs. John Brothers to recoup him for these payments made in any given month by the 15th of the following month. Messrs. John Brothers fell behind in their payments and the learned company Judge on various occasions gave them time to make good the amount which was due from them. Eventually the learned Judge on the application in question passed the order that payment should be made of this amount of about half a lakh; and if not made within a week the order should be executed as a simple money decree. The only question before us is whether the learned Judge had jurisdiction under the Indian Companies Act to make such an order. His order does not state that any such question was raised before him; nor does it purport to be under any section. The learned counsel for the respondent says that the order is to be considered as based on the Indian Companies Act (Act VII of 1913), sections 188 and 199. Section 188 provides as follows: "The court may order any contributory, purchaser, or other person from whom money is due to the company to pay the same into the Bank of Bengal, the Bank of Madras or the Bank of Bombay, as the case may be, or any branch thereof, respectively, to the account of the official liquidator instead of to the official liquidator, and any such order may be enforced in the same manner as if it had directed payment to the official liquidator."

Now it may appear on first reading of the section that it would cover the procedure adopted by the learned company Judge. There is, however, no precedent for such a view and the only rulings which have been produced by learned counsel before us adopt a contrary view in regard to precisely similar provisions in force at various times in England. *Prima facie* a matter of this sort would not form the subject of an order in liquidation unless there is some authorisation for such

a course of action in the Companies Act. The position of Messrs. John Brothers was merely that of persons who entered into a contract with the liquidator during the course of the liquidation. In the present matter there is no suggestion made that Messrs. John Brothers were in any sense contributories on whose behalf any liability existed which could be enforced by the liquidator. Learned counsel for the respondents took up the position that any transaction made by the liquidator, such as for example the sale of cloth in the case of liquidation of a cloth company, could result in an order by the learned company Judge enforcing the conditions of that sale. That is a somewhat extraordinary proposition, and it is not clear why the Companies Act should contemplate such a procedure. *Prima facie* the Act in regard to liquidation provides a means by which the assets of a company may be realised by the liquidator and claims due from persons in section 185, contributories etc., may be realised from those persons by order of the court. As regards those matters it is not necessary that the liquidator should file a suit in another court. The company Judge has jurisdiction for the purpose of carrying out the liquidation, that is, the realisation of the assets of the company and the payment of the creditors, etc. But judicial decision of matters which may arise with third parties owing to the transactions entered into by the liquidator does appear to be foreign to the jurisdiction of the learned company Judge. There is *prima facie* nothing in the matter of liquidation which would call for the exercise of such a jurisdiction. To a great extent the subject of liquidation is similar to the subject of insolvency, and no such jurisdiction exists in an insolvency court. Now the natural interpretation of section 188 appears to be that the section is intended, as the marginal note states, for a power to the court to order payment into a Bank instead of payment to a liquidator. We consider that section 188 means that

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where an order may be passed against a purchaser to pay to the liquidator it may be passed against the purchaser to pay to the Bank. It is true that the end of the section states: "and any such order may be enforced in the same manner as if it had directed payment to the official liquidator." It is claimed by the learned counsel for respondents that these words give jurisdiction to enforce an order against persons other than contributories, or persons mentioned in section 185. But it does not appear to us that that meaning can be read into the section. We think that the natural construction to place on these words is that if an order can be enforced, which is an order directing payment to an official liquidator, the same order can be enforced if it directs payment to a Bank. We, therefore, have to see whether the order could be enforced if it directed payment to the liquidator, and for this purpose we must refer to other sections of the Act. It is admitted by the learned counsel for respondents that there is no other section of the Act dealing with a person in the position of the appellants. The appellants do not come under section 185 as they are not contributories, or trustees, receivers, etc., mentioned in that section. Therefore, if the order had been that they were to pay to the official liquidator, that order could not have been enforced under the provisions of section 185. We consider, therefore, that the order cannot be enforced under the provisions of section 188.

Considerable argument has been made in regard to the opening words of section 188: "The court may order any contributory, purchaser, or other person from whom money is due to the company." Now these words undoubtedly cause a considerable difficulty in interpretation. "A contributory" is a clear reference to a contributory as defined in the Act in section 185, and also as regards liability in section 185 etc. But what is meant by the word "purchaser" and what is meant by the words "other persons from whom money

is due"? The word "purchaser" has appeared in the English Acts dating from the Act of 1862 onwards, and has still continued in the Act of 1929. We think that a purchaser does not mean, as learned counsel contended, any person who had purchased any goods from the liquidator or from the company. If the word "purchaser" had this meaning of the purchaser of goods, we think that the section would have defined it more precisely. The word does not occur in any portion of the Act. We think that the word purchaser must be taken to refer to the word contributory which immediately precedes it, and that it means the purchaser of the interest of a contributory. It is to be noted that in English law purchaser has a wide meaning and includes all persons to whom property passes except by inheritance. As regards the words "or other person from whom money is due" we think that this has a reference to a person from whom money is due under section 185 so far as it is intended that an order enforcing payment should be made, but as regards "other persons from whom money is due" it is no doubt open to the court to pass an order asking the other persons to pay the money into the Bank instead of to the liquidator. The question has been before the English courts on two occasions. One of these is reported in *In re United English and Scottish Assurance Company; Ex parte Hawkins* (1). That was a case where a creditor of a joint stock company obtained a garnishee order attaching money of the company in the hands of a banker, and subsequently a petition for winding up of the company was presented; and after presentation of the petition, but before the winding up order, the creditor obtained payment of the money from the banker. The official liquidator then applied under section 100 of the Companies Act of 1862 for the creditor to refund the money. The wording of this section 100 is similar to the wording of section 185 of

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(1) (1867-8) Law Rep. 3 Ch., 787.

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our present Indian Companies Act, and section 103 corresponds to section 188. The claim of the official liquidator was that the creditor might be considered a trustee within the meaning of section 100. It is to be noted that the claim was not pressed apparently before the court that the creditor might come under the wording of section 103 as a person from whom money was due to the company. The VICE-CHANCELLOR passed an order for repayment to the liquidator, and then on page 790 Sir W. PAGE WOOD, L.J., stated: "I entertain no doubt that the Court had no jurisdiction to make the order appealed from. Section 100 is as follows (His Lordship read the section). The object of the enactment was to prevent the expense of the company bringing actions against the persons named, who are its own contributories and officers, and ought not to be extended to other persons. I say this the more confidently since the two cases, *Hollinsworth's* case (1) and *Cox's* case (2). As to the 103rd section, all that it does is to substitute the Bank for the official liquidator. It cannot extend the provisions of the 100th section." Sir C. J. SELWYN, L.J., on page 791 remarked: "I also think that *Hollinsworth's* and *Cox's* cases are conclusive authorities that a constructive trust of this kind is not within the 100th section of the Companies Act of 1862. . . In the present case I am of opinion that the order appealed from having been made without jurisdiction, justice requires. . ." The second time that the matter came before the courts in England was in *In re Vimbos, Limited* (3). This was a case where debenture-holders had appointed a receiver to realise the assets of the company and there was also a proceeding for the liquidation of the company. The receiver of the debenture-holders received certain assets and made payments to the debenture-holders and retained a certain sum as his remuneration. The liquidator

(1) (1849) 3 DeG. & Sm., 102.

(2) (1850) 3 DeG. & Sm., 180.

(3) [1900] 1 Ch., 470.

called by summons in the winding up for an order to fix the remuneration of the receiver and claiming that the balance should be paid over to the liquidator. It was held by the court that this was not a matter in which the court in liquidation had any jurisdiction. The claim against the receiver was one for which the liquidator must bring a suit. On page 474 the learned Judge stated: "It seems to me that the ordinary course of law would have to be followed, namely, an action commenced by the liquidator against the alleged agent (the auctioneer or stockbroker in the case I put) claiming this money as the money of the company. . . I therefore, without going at all into the merits of this case, am bound to find that I have no jurisdiction and that I must dismiss the summons." We consider that these precedents should be followed. In *Tarachand Jeramdas v. Official Liquidators, People's Bank of India* (1) there was a case before two learned Judges of the Punjab Chief Court under the corresponding sections 149 and 152 of the Indian Companies Act of 1882. In that case it was held that there was no provision in the Companies Act which enables the court directing the winding up to recover or authorise the recovery of moneys in the hands of persons other than those expressly mentioned in section 149 by summary process, and that the court had no jurisdiction to pass orders directing the refund of moneys obtained by the appellants in execution of their decrees before the order for the winding up was passed or authorising the official liquidators to take action to recover the said moneys under the Act, and that the only course open to official liquidators was to institute a suit in the regular way. In view of this authority we consider that it has not been shown that the learned company Judge had jurisdiction to pass an order in the summary manner which he adopted; and therefore we consider that the order was without jurisdiction. Accordingly we allow

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(1) Punj. Rec. 1915, p. 211.

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this Letters Patent appeal and we set aside the order of the learned company Judge. We make no orders as to costs in view of the fact that the appellants admit that the claim is correct, and that the matter of jurisdiction had not been taken seriously before the learned company Judge in the form in which it has been taken before us.

## REVISIONAL CRIMINAL

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and  
 Mr. Justice Bennet*

1936  
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EMPEROR v. JASNAMI AND OTHERS\*

*Indian Penal Code, section 153—"Illegal act"—Depressed classes riding in palanquins through a hill village—Objection by high caste Hindus—Local practice—Police officer's order to dismount from palanquin—Order unauthorised—Police Act (V of 1861), section 31—Scope of section—Apprehension of riot.*

Section 31 of the Police Act is intended primarily for the purpose of keeping order on public roads, preventing confusion, regulating traffic and avoiding obstruction. The section cannot empower every police officer, whether a police inspector or a constable, to issue orders prohibiting the doing of otherwise legal acts simply because he apprehends that a breach of the peace would be committed by other persons if the persons ordered not to do the legal acts persisted in doing them. The section does not authorise a police officer to issue an order which only a Magistrate might have issued under section 144 of the Criminal Procedure Code, to refrain from doing a perfectly legal act.

A bride and bridegroom, *doms* by caste, were about to be carried in palanquins through a hill village in Kumaun, and objections were raised by the high caste Hindus of the village that depressed class people were never permitted to ride in palanquins through the village, that the palanquins should be carried empty and the bride and bridegroom should walk. The qanungo, who in Kumaun has the status of circle inspector of police, and who had been directed to be present, apprehending a possible breach of the peace, intervened and ordered

\*Criminal Revision No. 853 of 1935, from an order of J. R. W. Bennett, Sessions Judge of Kumaun, dated the 29th of July, 1935.

that the palanquins should be carried empty. Certain persons, in disobedience of this order, put the bride and the bridegroom into the palanquins and had them carried through the village. These persons were thereupon convicted under section 153 of the Indian Penal Code. The criminal courts found that there was a local practice against depressed classes riding in palanquins through the village. *Held*, that the conviction under section 153 was bad, as the accused had not done anything which was illegal; riding in palanquins through a village was not an act illegal in itself, nor had any civil court held that there was any village custom having the force of law which prevented people of depressed classes from doing so in the village, and which the accused could be said to have transgressed. Disobedience of the qanungo's order was not an illegal act, as he had no authority to issue the order.

Mr. *D. P. Uniyal*, for the applicants.

The Assistant Government Advocate (*Dr. M. Waliullah*), for the Crown.

SULAIMAN, C.J., and BENNET, J.:—This is an application in revision from an order of the Sessions Judge upholding the conviction of the accused persons under section 153 of the Indian Penal Code and the sentences of fine imposed on them.

It appears that the accused are Doms by caste who have recently become Arya Samajists. There has been a practice in some hill villages not to allow marriage processions with palanquins and dandies occupied by the bridegroom and the bride to pass through village sites. The high caste Hindus had on previous occasions objected to such actions. Indeed the present accused took out such a procession on the 16th of November, 1933, which was obstructed and had to be postponed till the 22nd of December, 1933, when the present occurrence took place. The secretary of the local Depressed Classes Association submitted an application to the Deputy Commissioner stating that on the previous occasion, namely on the 16th of November, 1933, the marriage party had been intercepted and looted on the way by high caste Hindus and that the very marriage was to take place on the 22nd of December, 1933, and

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it was just possible that the marriage party might be disturbed on the way. He therefore prayed that police arrangements should be made for their safe passage. The Deputy Commissioner ordered: "If they want regular police, they cannot have them; they may have no protection if they want to go through villages on conveyances. If they are molested on the public way, the assailants will be prosecuted." The Deputy Commissioner apparently declined to grant the processionists the protection of the police if they insisted on going through the villages on conveyances, but offered them protection if they were molested while going along a public road. The order contained no prohibition against their going on conveyances through the villages but merely contained an intimation that they should not in such an event expect protection by the police. The qanungo and patwari were later directed to be present on the 22nd of December and to prevent a breach of the peace. The accused took out a marriage procession on that day and when an objection was raised by the residents of another village both sides came to an agreement and the palanquins were allowed to go unoccupied while passing through the village. But the processionists entered the village of the bride and carried the bridegroom in the palanquin during the night time, when the villagers did not see the passengers. So no disturbance took place. But on the 23rd of December, 1933, the marriage procession started from the house of the bride at 10 o'clock in the morning and there was an objection raised by the high caste Hindus of the village that the palanquins should be carried empty. The qanungo, accompanied by the patwari, intervened and ordered that the palanquins should be carried empty. This order was not obeyed and the accused forcibly put the bridegroom and the bride into the palanquins and carried them through the village sites. They were then prosecuted for an offence under section 153 of the Indian Penal Code on the allegation that they

made the bride and the bridegroom to be carried in conveyances through the inhabited area of the village contrary to the custom of the locality. Both the Magistrate and the Sessions Judge came to the conclusion that there was a local practice against such conduct. They also thought that the qanungo was empowered under section 31 of the Police Act to issue the order for the purpose of maintaining law and order, and acted in good faith in trying to preserve peace. When the matter came up in revision before a learned Judge of this Court he felt some doubt as to the power of a police officer to prevent a person from doing what would ordinarily be considered to be a legal act though on a public thoroughfare, and has therefore referred the case to us.

Now it has to be conceded that section 153 cannot possibly apply unless there has been "doing anything which is illegal". If the act done is illegal, then if the other conditions laid down in the section are fulfilled, the case would be governed by it. One has therefore to see whether the act of the accused in taking out the bride and the bridegroom in palanquins through the village site was an illegal act. Now no civil court has held that there is any such village custom having the force of law which prevents people from going over village sites in palanquins or dandies. It may well be doubted whether such a custom can ever be recognized by a court of law. There is accordingly no finding that the accused committed an illegal act because they acted in defiance of any such custom having the force of law.

The learned Assistant Government Advocate supports the conviction on the ground that the act of the accused was illegal because it was contrary to the order of the qanungo who in Kumaun has the status of a circle inspector. Now the action of the accused in defiance of the circle inspector's order would be illegal, if the latter were authorised to issue that order. It is therefore

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necessary to see whether a circle inspector is empowered to order the bride and the bridegroom to get down from the palanquins in which they are being carried through inhabited parts of the hill villages. The act of going through the village on conveyances is in itself perfectly legal. It is not illegal within the meaning of section 43 because it is neither an offence, nor is it prohibited by law, nor does it furnish a ground for a civil action, unless a custom having the force of law has been established.

The main question is whether under section 31 the police officer whose duty it is to "keep order" on the public roads, etc., and to prevent obstructions, etc., can issue such an order. So far as the latter portion of the section is concerned there can be no doubt whatsoever that the action of the accused did not in any way cause obstruction on the public roads. There was no objection taken to the taking out of the palanquins themselves. The objection was taken to the bridegroom and the bride being inside such palanquins. It cannot therefore be suggested that the fact that the bridegroom and the bride were placed inside the palanquins instead of being made to walk on foot on the public road caused any fresh obstruction which had to be prevented. As a matter of fact even if there had been any obstruction on the public road, this might well have lessened it. But it is contended that the words "keep order" mean "maintain law and order" and therefore also mean "prevent a breach of the peace". It is therefore urged that a police officer, when he finds that there is an apprehension of a breach of the public peace, is entitled to issue necessary orders which would have the effect of preventing such a breach. Now although one is not inclined to give a narrow scope to section 31, as that may hamper the police in their legitimate exercise of their duty in preserving the public peace and in preventing the commission of crimes, it is necessary not to give it so wide a scope as to empower all police officers under

this section to do things which under the Code of Criminal Procedure are limited to being exercised by Magistrates or police officers of high rank. Section 31 is obviously intended to empower police officers to regulate traffic on public roads, to prevent the commission of offences on such roads, for example, affrays, and also to do their best to prevent obstruction. Where a breach of peace is apprehended and there is a previous intimation the proper course, of course, is to approach the Sub-Divisional Magistrate for necessary orders. Section 144 of the Criminal Procedure Code gives ample powers to Magistrates to issue appropriate orders for the immediate prevention of a disturbance of public tranquillity, and in the exercise of his powers under that section a Magistrate is authorised to prevent the doing of even lawful acts. Again where there is an immediate danger of the commission of a cognizable offence a police officer may under section 149 of the Criminal Procedure Code interpose for the purpose of preventing the commission of such cognizable offence. Where there is an immediate apprehension of a breach of the peace between two unlawful assemblies, the officer in charge of a police station may order either or both of the two unlawful assemblies to disperse, and failure to obey his order would amount to an illegal act and may constitute an offence under section 188 of the Indian Penal Code. Such was the case in *Emperor v. Raghunath Venaik Dhulekar* (1), where the sub-inspector had ordered the assembly to disperse on becoming convinced that it was likely to cause a disturbance of the public peace, and his order being legal, the failure to obey it and acting contrary to his order amounted to an illegal act within the meaning of section 151 of the Indian Penal Code. The case of *Sham Sunder Lal v. Emperor* (2) was a case where there was actually an obstruction of a thoroughfare caused owing to the altercation which ensued between the accused, who was the driver of a bullock

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(1) (1924) I.L.R., 47 All., 203.

(2) A.I.R., 1926 All., 264.

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cart, and the tax collector when the former refused to pay the toll demanded from him.

But we are unable to hold that section 31 of the Police Act empowers every police officer, whether a police inspector or a constable, to issue orders prohibiting the doing of otherwise legal acts simply because he apprehends that a breach of the peace would be committed by other persons if the persons ordered not to do the legal acts persisted in doing them. Such an interpretation of section 31 would make it come in conflict with the various provisions of the Code of Criminal Procedure where particular forms of orders are within the exclusive authority of Magistrates or police officers. For instance, an order for the dispersal of an unlawful assembly can be made only by a Magistrate or an officer in charge of a police station under section 127 of the Criminal Procedure Code and a head constable is not empowered to act under that section. It could not have been the intention of the legislature to empower head constables to exercise under section 31 of the Police Act powers which have been conferred exclusively on Magistrates and officers in charge of police stations under section 127 of the Criminal Procedure Code. Nor could it have been the intention of the legislature to empower every police officer, including constables, to issue orders, for example, under section 144 of the Criminal Procedure Code, which a Magistrate only can issue. Section 31 is intended primarily for the purpose of keeping order on the public road, preventing confusion, regulating traffic and avoiding obstruction. Orders passed in such cases would be well covered by the provisions of that section. In our opinion section 31 does not authorise a police officer to issue an order which a Magistrate might have issued under section 144 of the Criminal Procedure Code to refrain from doing a perfectly legal act.

The act of the accused was a perfectly legal act in taking out the bridegroom and the bride in palanquins

along public roads or highways and their failure to agree to carry out the instructions of the police officer to dismount did not amount to an illegal act within the meaning of section 153 of the Indian Penal Code because in our opinion the police officer was not empowered to issue such an order. If there had been any apprehension of an immediate breach of the peace he might have asked the assembly to disperse under section 127, or if he had previous intimation of it he might have obtained an order under section 144 from the Magistrate. Failing to have adopted either of these courses he could not arrogate to himself the power to order that the bridegroom and the bride should not go in palanquins. We think that to uphold the conviction of the accused in this case would amount to an undue interference with the liberty of ordinary citizens which it is their right to enjoy.

We accordingly allow this application and setting aside the convictions and sentences of the accused acquit them of the charge and direct that the fines, if paid, be refunded.

## REVISIONAL CIVIL

*Before Mr. Justice Allsop*

RAM GHULAM (PLAINTIFF) *v.* BANDHU SINGH  
(DEFENDANT)\*

1936  
February,  
28

*Agriculturists' Relief Act (Local Act XXVII of 1934), sections 3, 5, 8, 12—Conversion of preliminary decree on mortgage into instalment decree—Transferee of mortgagor is entitled to apply—Period of instalments—Date from which such period is to be reckoned.*

A preliminary decree for sale on a mortgage was passed against a transferee of the property from the mortgagor. Subsequently, on the coming into force of the U. P. Agriculturists' Relief Act, he applied under section 5 of the Act for conversion of that decree into a decree for payment by instalments in accordance with section 3.

\*Civil Revision No. 465 of 1935.

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*Held*, that the fact that the loan was not advanced to him did not disentitle him to apply, if he established that the mortgagor was an agriculturist and that he himself was an agriculturist at the date of the loan as well as at the date of the suit, as laid down in section 8.

*Held*, also, that if the applicant was, as he claimed to be, an agriculturist coming under explanation VI to section 2(2), he would be an agriculturist for the purposes of chapter III; and as he was a person who would have been entitled to redeem the mortgage under section 12 which is in chapter III, he was an agriculturist to whom chapter III applied; and therefore, in accordance with section 3, the period of instalments could not extend beyond four years from the date of the decree.

*Held*, further, that for the purposes of section 5 the meaning of the word "decree" in the proviso to section 3(1) is the decree for instalments and not the original decree which is converted into a decree for instalments; therefore, the period of instalments is to be reckoned from the date of the instalment decree which is to be passed under chapter II.

Messrs. *Baleshwari Prasad* and *Sri Narain Sahai*, for the applicant.

The opposite party was not represented.

ALLSOP, J.:—This is an application in revision against an order passed by the learned Munsif of Chandausi in the course of proceedings in execution of a decree. The suit which gave rise to these proceedings was instituted on the 27th of February, 1935. It was a suit for the recovery of a sum of Rs.1,040 with interest by the sale of property mortgaged by a deed dated the 6th of May, 1927. The defendants to the suit were the heirs of the deceased mortgagor and a subsequent purchaser of the property who is now the opposite party to this application. This subsequent purchaser, Bandhu Singh, acquired the property by sale in the month of August, 1933. He paid a sum of Rs.3,100 for the property. Out of this sum Rs.750 were left in his possession in order that he might redeem the mortgage of the 6th of May, 1927. He did not redeem and it was for this reason that the suit was instituted. The learned Munsif passed a preliminary decree on the 27th of March, 1935, and then

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Bandhu Singh put in an application that the decree might be converted into a decree for payment by instalments under the provisions of section 5 of the Agriculturists' Relief Act. The learned Munsif accepted his contention, reduced the interest and directed that payment should be made by annual instalments of Rs.150.

Two points are raised by the applicant. The first is that the Agriculturists' Relief Act did not apply to Bandhu Singh. The other is that the court below was not entitled to pass an order by which the period of payment by instalments extended beyond four years.

The argument upon the first point is based on the provisions of section 8 of the Act. Section 5 and section 8 are both in chapter II. Section 8 says that "No person shall be deemed to be an agriculturist for the purposes of this chapter unless he was an agriculturist both at the time of the advance of the loan as well as at the date of the suit." The applicant contends that Bandhu Singh had no existence as an agriculturist in so far as this transaction is concerned, because the money was not advanced to him. This argument has, in my opinion, no force. We cannot go beyond the plain meaning of the section. Bandhu Singh claims to be an agriculturist for the purposes of section 5 and therefore all that can be expected of him is that he should establish that he was an agriculturist at the date when the suit was instituted and also that he was an agriculturist at the date when the loan was taken. It cannot be said that he cannot be deemed to have been an agriculturist on this latter date merely because the loan was not advanced to him. In order that section 5 should apply it is necessary for Bandhu Singh to establish three facts, namely (1) that the mortgagor was an agriculturist, because otherwise the transaction would not amount to a loan within the meaning of the Act according to the definition given in section 2(10)(a); (2) that he himself was an agriculturist on the date of the loan; and (3) that he himself was an agriculturist at the



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date of the institution of the suit in which the decree was passed. I find that a specific objection was taken in the court below that Bandhu Singh was not an agriculturist at the date when the mortgage was executed. There is no finding upon this question and therefore the court below was not entitled to pass the order which it did pass. Unless it is found that Bandhu Singh was an agriculturist at that date it cannot be said that the court had jurisdiction to apply section 5 of the Act to him. For this reason the order of the court must be set aside and the case returned for decision.

The other point raised was that the instalments should not have been extended beyond a period of four years. Under section 5 of the Act a decree for payment of instalments must be drawn up in accordance with the provisions of section 3. Section 3 says that the period of instalments shall not extend beyond four years from the date of the decree in the case of an agriculturist to whom chapter III applies. The question therefore is whether chapter III applies to Bandhu Singh. Section 12 is in chapter III. It provides that "an agriculturist who has made a mortgage either before or after the passing of this Act, or any other person entitled to institute a suit for redemption of the mortgage, may, at any time after the principal money has become due and before a suit for redemption is barred, file an application before the court within whose jurisdiction the mortgaged property or any part of it is situate . . . praying for an order directing that the mortgage be redeemed." Bandhu Singh was a person who would have been entitled to redeem the mortgage under the provisions of section 12 of the Act and therefore he is a person to whom that chapter applies. The question now is whether he is an agriculturist to whom that chapter applies, because, if he is, the period of instalments must not extend beyond four years from the date of the decree. An agriculturist for the purposes of chapter III, in accordance with explanation VI to section 2(2), is a

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person who, if he pays both rent and revenue, does not pay a total of rent and revenue exceeding Rs.1,000. Bandhu Singh says that he pays Rs.88 a year as Government revenue and Rs.50 a year as rent. He is consequently an agriculturist to whom the provisions of chapter III of the Act apply. It follows from this that the period during which instalments are to be paid shall not exceed four years.

There may be one further difficulty in applying a meaning to the term decree in the proviso to section 3(1) of the Act. The Act says that the period of such instalments shall not extend beyond four years from the date of the decree. Section 3 refers to those cases in which an instalment decree is passed in the first instance. Section 5 applies those terms to instalment decrees passed on the conversion of other decrees.

I have no doubt that for the purposes of section 5 the meaning of the word decree in the proviso to section 3(1) is the decree for instalments and not the original decree which is converted into a decree for instalments. I consider that the court at the time of passing an instalment decree under chapter II shall reckon the period of instalments from the date of the instalment decree and not from the date of the original decree.

As the court below has not decided whether Bandhu Singh was an agriculturist at the date when the loan was made, that is on the date when the mortgage was executed, the order of the court below is set aside and the case is remitted for decision according to law after all the necessary questions at issue have been decided. The costs in this application will abide the result.

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and  
Mr. Justice Bajpai*

1936  
March, 4

TULSHI RAM (DEFENDANT) *v.* BRINDABAN DAS  
(PLAINTIFF)\*

*Civil Procedure Code, section 115—"Case decided"—Order  
setting aside an award in a pending suit.*

*Held*, in accordance with the principle of *stare decisis*, that no revision lies from an order setting aside an arbitration award while the suit still remains pending, inasmuch as no case has yet been decided, within the meaning of section 115 of the Civil Procedure Code.

Dr. S. N. Sen and Mr. Krishna Murari Lal, for the applicant.

Messrs. S. N. Gupta and V. D. Bhargava, for the opposite parties.

SULAIMAN, C.J., and BAJPAI, J.:—This is an application in revision on behalf of the defendant minor from an order setting aside an award and directing that the suit should proceed. A preliminary objection is taken on behalf of the plaintiff that no revision lies. The plaintiff had brought a suit for a declaration that he was the sole heir of his deceased father Brij Mohan Lal and was exclusively entitled to certain Government securities left by him, because his two brothers and a nephew were separate from the deceased father. He impleaded his brothers and nephew. The two brothers did not file any written statement and did not appear to contest the claim. The claim was resisted exclusively by the applicant, Tulshi Ram, not on the ground that the family was joint and the other two brothers Badri and Nathi Lal were entitled to a share, but that although Brij Mohan Lal was the sole owner of these properties he had left the entire estate to Tulshi Ram under a will. Both the plaintiff and the contesting defendant's guardian agreed to refer the matter to arbitration and left out the two absent defendants. The arbitrator delivered an award in favour of defendant

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\*Civil Revision No. 658 of 1934.

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No. 3. The plaintiff thereupon raised a rather belated objection that he and the contesting defendant had left out two necessary parties who ought to have joined in the reference. The court below has set aside the award on the sole ground that these two brothers, whose title neither the plaintiff nor the defendant had admitted, were necessary parties and therefore the award was invalid. We are not concerned with the merits of the case at this stage.

The first question to decide is whether a revision at all lies. Assuming in favour of the applicant that the order of the court below was irregular or even illegal, we have no jurisdiction to interfere under section 115 of the Civil Procedure Code unless a case has been decided. Now there are a very large number of cases of this Court, not to speak of the other High Courts, on the question whether revisions should be entertained from interlocutory orders or not. It is not possible to try to reconcile all the cases and lay down a hard and fast rule which would be applicable to all such cases. The only appropriate course is to accept the well known principle of *stare decisis* and follow the rulings of this Court which are directly in point. It is no use trying to bring in principles which might point to a contrary conclusion when there is a series of direct rulings of this Court upholding the other view. It has to be conceded by the learned advocate for the applicant that there are no less than four reported cases of this Court in which it has been distinctly laid down that no revision lies from an order setting aside an arbitration award while the case still remains pending in the court below. Under the old Code there was the case of *Chattar Singh v. Lekhraj Singh* (1). This case was followed in *Shah Muhammad Fakhruddin v. Rahimullah Shah* (2). The same view was accepted in *Rudra Prasad Pande v. Mathura Prasad Pande* (3), and again in *Risal Singh v.*

(1) (1883) I.L.R., 5 All., 263. (2) (1924) I.L.R., 47 All., 121.

(3) (1925) I.L.R., 47 All., 915

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*Faqira Singh* (1). In all these four cases this High Court held that no revision lay from the order setting aside an award while the case had not been fully decided.

The learned advocate for the applicant relies on the case of *Kanhaiya Lal v. Jagannath Prasad Hanuman Prasad* (2). That was a case where the main question was as to whether the court below had erred in superseding a reference to arbitration. The award had no doubt been delivered and the case was still pending in the court below. WALSH, J., came to the conclusion that a revision lay. PIGGOTT, J., was somewhat doubtful, and indeed at page 310 observed: "Possibly, if I were certain that my own individual view in this matter would prevail, not only at this stage but throughout this particular litigation, I might be disposed to hold that the proper course for the defendant was to wait for the final decree of the trial court and to challenge the order setting aside the award in his memorandum of appeal, in the event of the suit ending in a decree against him." In view of certain rulings showing a considerable conflict of judicial opinion that were placed before him, he concurred in the order proposed by WALSH, J., but made a reservation that he did not stand committed to the view that an order like the one complained of could not be challenged in appeal later. In the case of *Gopal Das v. Baij Nath* (3) the court below had dismissed the objections to the award and upholding the award had passed a decree in terms of it. The suit was, therefore, completely disposed of and no case remained pending in the court below. That case, therefore, is not in point. In the case of *Bhola Nath v. Raghunath Das Mithan Lal* (4) a revision was sought against an order superseding the reference itself which had been made by the court to arbitration, before the arbitration proceedings had concluded and any award

(1) (1931) I.L.R., 53 All., 1006.

(3) (1925) I.L.R., 48 All., 239.

(2) (1920) I.L.R., 43 All., 305.

(4) (1929) I.L.R., 51 All., 1010.

could be delivered. The Bench in that case took the view that the application filed for the recalling of the arbitration proceedings after the reference had been made started a new proceeding outside the scope of the suit, and its termination was in itself a case decided. As the facts of that case are different from those of the case before us, we do not consider that that case is in point. This case was distinguished on this very ground in *Risal Singh v. Faqira Singh* (1).

The case of *Ganga Singh v. Kr. Jitwar Singh* (2) was no doubt a case where a revision was entertained from an order setting aside an award, but no objection was taken in that case on behalf of the respondent that no revision lay, and the point was, therefore, neither argued nor considered from that aspect. That case, therefore, cannot be regarded as an authority for the proposition that a revision really lies, particularly as the earlier Division Bench cases were not placed before the Judge.

Following the long series of rulings of this Court holding that no revision lies in such a case, inasmuch as no case has been yet decided, we dismiss the application with costs.

### FULL BENCH

*Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Thom and Mr. Justice Rachhpal Singh*

RAM SWARUP AND OTHERS (PLAINTIFFS-APPLICANTS) v. ANANDI LAL AND OTHERS (OPPOSITE-PARTIES)\*

1936  
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1936  
March, 4

*Civil Procedure Code, order XL, rule 1(2)—Receiver—Appointment of receiver of mortgaged property, pending decision of appeal from preliminary decree for sale on simple mortgage—Jurisdiction—Civil Procedure Code, section 94(d)—Interpretation of statutes—Words—Same words used in different places of the same section should have the same meaning.*

\*Application in First Appeal No. 164 of 1935.

(1) (1931) I.L.R., 53 All., 1006.

(2) A.I.R., 1935 All., 1014.

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LAL

Pending the decision of an appeal from a preliminary decree for sale on a simple mortgage, the mortgagee decree-holder applied in the appellate court for the appointment of a receiver of the mortgaged property on the allegation that the defendant mortgagor was dealing with the mortgaged property in such a way as to depreciate its value seriously:

*Held*, that under the provisions of the Civil Procedure Code the court has no power to appoint a receiver of any property so as to remove from the possession or custody of the property any person, whether a party to the suit or not, whom any party to the suit has not a present right so to remove; and inasmuch as the mortgagee, in the case of a simple mortgage, has no right to obtain possession of the mortgaged property or its rents and profits by dispossession of the mortgagor before the termination of the mortgagor's interest by actual sale of the property in execution of the final decree for sale, a receiver could not be appointed in the present case to take possession of the mortgaged property or its rents and profits.

The authority to appoint a receiver is prescribed in order XL, rule 1 of the Civil Procedure Code and the court cannot act outside that rule. Section 94(d) of the Code does not confer unrestricted powers on courts to appoint a receiver in any case, because the section contains the words "if it is so prescribed", i.e. prescribed by the rules; section 94(d) is, therefore, governed by order XL, rule 1.

The general power given under sub-rule (1) of order XL, rule 1 has been curtailed by sub-rule (2). The language of sub-rule (2) is plain, and the words "any person" in that sub-rule are general and comprehensive so as to include persons who are parties as well as persons who are not parties to the suit. There is no justification for putting a forced interpretation on sub-rule (2) by adding the words "other than parties to the suit" after the words "any person".

It is a well settled rule of interpretation that the same expression used in the same section at different places is to be given the same meaning. The words "any person" also occur in sub-rule 1(b) of the rule; and it is impossible to hold that the words "any person" in sub-rule 1(b) mean "any person other than a party to the suit".

It is of the essence of a simple mortgage that the corpus of the mortgaged property forms the security for the debt but the income is the property of the mortgagor and he is absolutely entitled to appropriate it until the property passes out of his

ownership by sale. There would, therefore, be no point in appointing a receiver, as regards the collection of such income.

The remedies which an English mortgagee can claim, or which even a simple mortgagee in England can claim, being very different from those of a simple mortgagee in India, English cases have no bearing on the present case, and all the more because in England there is no rule corresponding to sub-rule (2) of order XL, rule 1 of the Civil Procedure Code. Again, the law having been codified in India, the question of jurisdiction to appoint a receiver depends not so much on considerations of equity or of hardship as on the language of the statutory enactment itself. Further, no such considerations can arise in favour of the simple mortgagee, who knows that by the terms of the mortgage the mortgagor is entitled to possession and usufruct of the property until actual sale.

There is ample provision in order XXXIX, rule 1 of the Civil Procedure Code to prevent waste or damage of the mortgaged property by the mortgagor.

Sir *Tej Bahadur Sapru* and Mr. *Chandra Bhan Agarwala*, for the applicants.

Dr. K. N. *Katju* and Mr. *Jagdish Swarup*, for the opposite parties.

SULAIMAN, C.J.:—The question referred to this Full Bench is: "Under the provisions of the Civil Procedure Code, is it competent to appoint a receiver of the property mortgaged, pending the decision of an appeal against a mortgage decree?"

In this case there had been a simple mortgage deed executed on the 30th of October, 1922; the suit for sale was filed on the 19th of May, 1933, and the preliminary decree was passed on the 8th of September, 1934. An appeal from this preliminary decree is pending in this Court. In the mean time the court below has passed a final decree for sale on the 17th of August, 1935.

The mortgagees have filed an application for the appointment of a receiver direct in the High Court, where the appeal from the preliminary decree is pending but no appeal from the final decree has been preferred. It is understood that the question for consideration is not merely whether a bare order appoint-

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ing a receiver of any property under order XL, rule 1(a) can be passed in this case, but the substantial question is whether the court is authorised to remove the mortgagor from the possession or custody of the mortgaged property.

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There is no doubt that there has been a considerable conflict of opinion on the main question in the various High Courts. Speaking broadly, the High Courts of Calcutta, Bombay, Madras, Lahore and Rangoon have taken the view that a receiver can be appointed even in a suit for sale on the basis of a simple mortgage, though even in these Courts there are earlier cases taking the contrary view. For instance, in *Kumarasawmy Pillai v. Pasupathia Pillai* (1) SPENCER, J., at page 608 remarked that "The words 'any person' are sufficiently wide, and in my opinion, should not be confined to persons who are not parties to the suit as was held in an unreported case of this Court." In *Girdhari Lal v. Pars Ram* (2), at page 459, BROADWAY, J., preferred to accept the same view as expressed in Allahabad. The High Court of Allahabad, the Patna High Court and the Oudh Chief Court have taken the view that the mortgagor cannot be deprived of the possession of the mortgaged property by such a receiver until the sale has actually taken place. I do not, however, propose to review the cases of the other High Courts, except only a few of them. But I must discuss the leading cases of this Court.

In *Gobind Ram v. Jwala Pershad* (3), RICHARDS, C.J., and BANERJI, J., considered the language of order XI, rule 1, and particularly clause (2) of that rule, and held that "It seems to us abundantly clear that neither the plaintiff nor the prior incumbrancer has any present right to remove the mortgagor from possession of the mortgaged property." They based their decision on the prohibition contained in clause (2) against the court

(1) (1920) 61 Indian Cases, 605.

(2) (1933) I.L.R., 14 Lah., 457.

(3) (1917) 43 Indian Cases, 533.

removing from the possession or custody of the property any person whom any party to the suit has not a present right so to remove. Quite a different idea has been attributed to the Bench in a Full Bench of the Madras High Court.

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In *Makhan Lal v. Mushtaq Ali* (1) WALSH and BANERJI, JJ., again held that the appointment of a receiver under order XL, rule 1 was inappropriate to a suit under a simple mortgage, and would in fact be contrary to the provisions of order XXXIV of the Code of Civil Procedure. In their opinion, order XL had nothing to do with the execution of mortgage decrees. It is hardly necessary to mention that this view has been followed in numerous unreported cases.

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The case of *Mohammad Ishaq v. Om Parkash* (2) was a somewhat peculiar case, the facts of which should be carefully examined. A mortgage decree for sale had already been obtained against the plaintiff and others. He then brought a suit to obtain a declaration that the decree was not binding on him. He followed it up with an application to the court for an injunction restraining the defendants decree-holders from executing their decree. The defendants as a counter measure filed an application for the appointment of a receiver of the mortgaged property. The court below had heard both the applications together and by the same order stayed the execution of the decree and also appointed a receiver of the property ordered to be sold. The plaintiff, who had secured the stay of the execution, came up in appeal challenging that part of the order by which the receiver had been appointed. The learned Judges pointedly remarked that "If the decree-holder is not going to have his decree executed, it is not fair to the decree-holder that the plaintiff should enjoy the income of the property without making any payment." The learned ACTING CHIEF JUSTICE then referred to order XL, rule 1(2), and expressed the opinion that it would

(1) A.I.R., 1927 All., 419.

(2) [1933] A.L.J., 51.

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be a very narrow construction on which to accept the argument that as the decree-holder is not entitled to remove the plaintiff whom he has not the present right so to remove, the court was not authorised to appoint a receiver, and remarked: "If this construction were good, there would be no case whatsoever in which a receiver could be appointed. All that sub-rule (2) means is that where any of the parties who are subject to the jurisdiction of the court has no right to remove a third party from possession, that third party shall be allowed to remain in possession. The parties to the suit being subject to the jurisdiction of the court can raise no objection whatsoever to its order for the appointment of a receiver." With the utmost respect, I would say that there was obviously an overstatement when it was said that if the narrow construction were good, there would be no case whatsoever in which a receiver could be appointed. Obviously there can be numerous cases of this kind; for example, where the suit is for recovery of possession of the property, or where the property is in the custody of the court or a third party like the Collector, or where the receiver is appointed in order to enable him to transfer certain properties, to recover debts, or to bring suits, etc., etc. The statement of the law that sub-rule (2) applies to third parties only will be dealt with separately. But on the facts of that case the decision can be supported on the ground that the plaintiff had applied for an injunction against the decree-holder restraining him from executing the decree, the grant of which was a discretionary matter under order XXXIX, rule 1, and the court could, therefore, put the plaintiff to terms. Apparently the court below had granted an injunction subject to the condition of the appointment of a receiver, and both directions had formed parts of the same order. The appellate court could, therefore, well say that the injunction having been granted on the condition of the appointment of a receiver, it would not,

while maintaining the injunction, remove the condition. Unfortunately, the two earlier cases of this Court were not cited by the counsel before the Bench. It may well be that the case was decided on its special facts. But with great respect, I am unable to agree with the view that sub-rule (2) applies to a third party *only*.

The learned ACTING CHIEF JUSTICE, who had decided *Mohammad Ishaq's* case (1), had to consider the same point in *Ram Prasad v. Bishambhar Nath* (2), when sitting with BENNET, J. That case was a peculiar one. In that case, although no express order for the appointment of a receiver had been made by the court below, which had passed the preliminary decree, it had actually issued an order that the tenantry should make deposits in court, that these deposits were to be made over to the judgment-debtor on his giving security, and the money should remain in the court's deposit to be made over to the rightful man when the appeal was decided. It was for all practical purposes a case where the court had brought the property in its own custody and under its own control by issue of an injunction and attachment. That is why the learned Judges felt called upon to consider the effect of orders XXXVIII, XXXIX and XL in a case where a preliminary decree under order XXXIV, rule 4, had been passed. BENNET, J., expressly dissented from the view expressed by the Full Bench of the Madras High Court, and the Calcutta and Rangoon High Courts, and held that where a plaintiff in a mortgage suit has no right to a personal decree, he cannot apply for the enforcement of personal remedies. MUKERJI, J., also expressed dissent from the Madras Full Bench case of *Paramasivan Pillai v. Ramasami Chettiar* (3). The case of *Rameshwar Singh v. Chuni Lal Shaha* (4) was distinguished because in that case a receiver had been previously appointed. The learned Judge pointed out that as the application for the appointment of the

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(1) [1933] A.L.J., 51.

(2) [1934] A.L.J., 561.

(3) (1933) I.L.R., 56 Mad., 515.

(4) (1919) I.L.R., 47 Cal., 418.

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receiver related to the mortgaged property itself and not to any other property, and there was no allegation in the application which would bring the case either under order XXXVIII or order XXXIX and the application was not meant to be one for preservation of property under order XXXIX, rule 7, but "the object of the application was simply to have the benefit of the income of the mortgaged premises before the mortgaged premises are sold up", hence the application should not be allowed. The learned Judge pointed out that the Madras case was based on the views of English law and ignored the definition of a simple mortgage as given in the Transfer of Property Act. Although it can be said that the question did not so directly arise in *Ram Prasad's* case (1), there can be no doubt that MUKERJI, J., on a reconsideration of the rulings of the other High Courts, came to a definite conclusion that the Calcutta and Madras views were not correct.

This case has been followed in another unreported case by ALLSOP and BAJPAI, JJ., in an application in *Daya Ram v. Girwar Lal* (2). On the other hand, IQBAL AHMAD and KISCH, JJ., in *Kr. Mohammad Zafar Husain Khan v. Khiali Ram* (3), upheld an order for the appointment of a receiver. It is not clear whether their attention was drawn to the previous rulings of this Court. In any case the question had not arisen in a mortgage suit, but in the course of an execution of a money decree in which the attachment of the property had been ordered. The case is therefore distinguishable.

The Patna High Court in *Nrisingha Charan Nandy v. Rajniti Prasad Singh* (4) has accepted the Allahabad view. COURTNEY-TERRELL, C.J., has pointed out the difference between an English mortgage and a simple mortgage in India. As regards certain English

(1) [1934] A.L.J., 561.

(3) Civil Revision No. 581 of 1932.  
decided on 8th March, 1933.

(2) F.A. No. 41 of 1931, decided on  
19th August, 1935.

(4) A.I.R., 1932 Pat., 360.

mortgages where there is a right of possession, and mortgages where there is a power of sale without reference to the court, the mortgagee is under section 69A of the Transfer of Property Act now himself entitled to appoint a receiver of the income of the mortgaged property, just as much as he can sell without the intervention of the court.

Now the main thing is to consider the reasons on which the two conflicting views have been based, rather than the number of cases holding either view. The grounds for holding that such a jurisdiction exists may be classified as follows:

(1). The *first* line of reasoning in a large number of cases, particularly of the Calcutta High Court, is that the power to appoint a receiver in a mortgage suit for sale existed in England, Ireland and America, and that it may, therefore, be held to exist in India also. By way of illustration the case of *Weatherall v. Eastern Mortgage Agency Co.* (1) may be quoted, where such cases are cited. There are several difficulties in this line of reasoning which seem to have been overlooked:

(1) The remedy which an English mortgagee can claim is not identical with the relief claimed by a simple mortgagee in India. As was pointed out by their Lordships of the Privy Council in the case of *Vasudeva Mudaliar v. Srinivasa Pillai* (2), the holder of an English mortgage has the option of suing for foreclosure or for sale. It is also settled law in England that when the date for the payment has expired and the money has not been paid, the simple mortgagee has a right to obtain possession of the property. The Indian law is entirely different. A simple mortgagee has no right of foreclosure and no right to obtain possession at all. His exclusive remedy is to realise his money by the sale of the property. And of course it can never be certain that he himself will be the ultimate purchaser of it.

(2) Another difficulty in this line of reasoning is that in England the appointment of a receiver is an equitable

(1) (1911) 13 C.L.J., 495.

(2) (1907) I.L.R., 30 Mad., 426.

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remedy and certain equitable considerations govern it. In India equity and law have been combined, and the complete law has been codified, and courts are accordingly governed by it. The question no longer is whether the English courts have jurisdiction to make any such order. The sole question is whether the Indian statutory law allows it or prohibits it.

(3) What has been consistently ignored in all the cases which have placed reliance on the English practice is that there is absolutely no rule in the English Annual Practice corresponding to sub-rule (2) of order XL, rule 1, which we have to interpret in India. Analogy from another system cannot be sought when there is a statutory enactment here which in terms is not to be found elsewhere.

I am, therefore, unable to attach any great weight to this line of reasoning.

(II). The *second* line of reasoning is a sort of a special pleading for the simple mortgagee, showing how hard it may be on him if a receiver is not appointed, how it may be possible for the mortgagor to waste and damage the property if no receiver is appointed, how he may appropriate the income while the interest remains unpaid and the mortgage debt is not satisfied, and so on. In such cases only a one-sided view has been presented, and the mortgagor's point of view not taken into account at all.

Now, when the question is one of interpretation of a statutory enactment, considerations of hardship which depend on a particular point of view favoured are not of much avail. The danger to the mortgaged property being damaged or wasted is imaginary. There is ample provision in order XXXIX, rule 1 to prevent waste and damage. As a mortgage creates a charge on the property there can of course be no real danger of alienation so as to deprive the mortgagee of his rights. Even as regards the properties of the mortgagor other than

those mortgaged, there is provision for attachment before judgment. The appointment of a receiver is, therefore, not the only possible remedy which a mortgagee can be said to have. The view that the mortgagor should not continue to appropriate the income of the mortgaged property when the mortgage debt is not satisfied and interest is not being paid utterly ignores the terms of the contract between the parties. In the case of a simple mortgage the property is a mere security for payment of the money, and the mortgagor is entitled to appropriate the income until the property passes out of his ownership by sale. The mortgagee has no right whatsoever to the income of the mortgaged property, to the rents and profits, or to obtain possession of it before the mortgagor has lost his interest in it. This being the contractual relation between the parties, there is absolutely no point in contending that it is unfair that the mortgagor should appropriate the income while the interest is not being paid. In case of default the mortgagee's remedy is to bring a suit for sale forthwith.

As against this, the mortgagor's point of view may also be noted. He has a right to redeem the property up to the last moment. He is entitled to retain the rents and profits and appropriate the income as long as his equity of redemption has not been extinguished. Even when a suit for sale is brought and a preliminary decree is obtained, the court is bound to give the mortgagor another chance to redeem the property, and is under a statutory duty to allow him time to redeem the mortgage and pay the mortgage money within the time fixed. To appoint a receiver of his property so that he may not have the rents and profits with which to pay the mortgage money would be ostensibly to give him an opportunity to redeem the mortgage and yet really deny it by making it almost impossible for him to do so. The mortgagor has merely undertaken the liability that if he is not able to pay the money with interest, his property would be liable to be sold. He had never

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agreed that the mortgagee would either himself or through the court dispossess him of the property before the procedure laid down for the realisation of the mortgage money by sale has been gone through. For a court to intervene and dispossess the mortgagor from the mortgaged property out of a regard for the mortgagee would be tantamount to inventing a new procedure to evade the provisions of order XXXIV, and forcing upon the mortgagor a new contract, never contemplated by him, which would have been more appropriate in the case of a possessory mortgage.

As under the terms of a simple mortgage the mortgagee is not entitled to the income or the usufruct of the property, which should go to the mortgagor, there is no point in appointing a receiver for the collection of such income. It cannot be paid to the mortgagee before the property has been purchased by him. If the object in appointing a receiver be to preserve the income so that it may be available later to the mortgagee if he can obtain a simple money decree under order XXXIV, rule 6, a more appropriate remedy would be the attachment of the income. Some of the learned Judges of Madras and Calcutta have even gone to the length of holding that the mortgagee is entitled to be paid the rents and profits realised by the receiver, as the usufruct is a part of his security. In this view I am altogether unable to concur. The court should not constitute itself a gratuitous protector of the simple mortgagee and allow him to receive the income of the mortgaged property in direct violation of the terms of the contract.

If examined purely from the standpoint of the convenience of the mortgagee, it may be considered proper to appoint a receiver so that a simple mortgagee may have the benefit of receiving income which his contract had not permitted to him. But the appointment of a receiver invariably implies an extra expenditure which courts as a rule direct to be met out of the income.

Thus the additional burden of a gratuitous appointment of a receiver falls on the mortgagor and his estate, though the benefit of it goes exclusively to the mortgagee.

(III). The *third* line of reasoning is that there being older cases under the Code of 1882 permitting the appointment of a receiver in a suit for sale, it must now be taken to be the law settled by authorities; see *Manindra Chandra Ray v. Suniti Bala Debi* (1), which was, however, a case of an English mortgage. The fact that there is a slight variation between the last paragraph of the old section 503 and sub-rule (2) of order XL, rule 1 has been overlooked. The prohibition contained in the previous paragraph was confined to "property under attachment", whereas the prohibition in sub-rule (2) applies to all kinds of properties. The difference which this change has brought about is obvious. Previously there was no prohibition against the appointment of a receiver under section 503 of a mortgaged property, which could not be under attachment. Now there is a prohibition in sub-rule (2) which applies to mortgaged property just as much as to property attached. The courts when deciding cases under the old Code were not so hampered, and could exercise their power under the substantial part of section 503 without any hindrance. But courts acting under the present Code have a greater restriction imposed on them. Reliance on the authority of the older cases is, therefore, not well placed.

(IV). The *fourth* line of reasoning is that the appointment of a receiver is an equitable relief, and all that is necessary to see is whether it is "just and convenient" to appoint a receiver irrespective of the nature of the suit. Of course, even as regards the question of justice and convenience, points of view would differ according as the position is viewed from the standpoint of the mortgagee or from that of the mortgagor. But

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(1) A.I.R., 1926 Cal., 1006.

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when the law has been codified in India, the question of jurisdiction depends not so much on equitable consideration as on the language of the statutory enactment itself.

(V). The *fifth* line of reasoning is to suggest that the appointment of a receiver of the mortgaged property and his taking over possession does not amount to the dispossession of the mortgagor at all inasmuch as the income or the rents and profits are mere accession to the mortgaged property. A typical case advocating such a view is *Paramasivan Pillai v. Ramasami Chettiar* (1). With the utmost respect, I would say that such a conception is untenable. The corpus of the mortgaged property is one thing, while its usufruct is quite another. The very essence of a simple mortgage is to keep a clear distinction between the corpus which is the security for the debt, and the income which belongs to the mortgagor. If the income were an accession to the mortgaged property, then the entire income from the commencement of the simple mortgage must be such an accession and must belong to the mortgagee and not to the mortgagor. If the income also is to belong to the mortgagee, then all distinction between a simple mortgage and a possessory mortgage may just as well be abolished, and the written contract between the parties torn to pieces.

It is impossible to say that merely because the receiver is an officer of the court, his taking over possession is not a dispossession of the person previously in possession. If his taking over possession of any property were not to amount to the removal of any person from the possession or custody of such property, then there was no occasion for sub-rule (2) at all. It need not have been there. The very fact that it has been enacted shows that the legislature intends that if a receiver takes possession of some property, then the person from whose custody or possession it is taken has been removed

(1) (1933) I.L.R., 56 Mad., 915 (926-7).

from such possession or custody. As soon as a receiver is appointed and property is taken possession of by him, the property passes out of the possession and custody of the other person. Even where the person in possession is himself appointed the receiver, the character of his possession changes and his liability is of a different nature, as he becomes an officer of the court and holds possession of the property on its behalf. But his dis-possession would be only constructive and not actual.

With regard to a few other cases cited at the Bar, I may point out that in *Eastern Mortgage and Agency Company v. Rakea Khatun* (1) sub-rule (2) of order XL, was not even discussed. In *Amarnath v. Mst. Tehal Kuar* (2) the learned Judges relied on the Calcutta case in *Kumar Satya Narain Singh v. Rani Keshabati Kumari* (3), and the Madras case in *Ajapa Natesa Pandara v. Ramalingam Pillai* (4). The contrary authorities were not cited by counsel as referring to the contention that a receiver of the property should not be appointed as possession of it cannot be awarded in a declaratory suit; the Bench observed: "Our attention has not been invited to any authority which would limit the jurisdiction of the court in the manner indicated above." This case was, of course, followed by a learned single Judge in *Paras Ram v. Puran Mal Ditta Mal* (5). The case of *Ma Joo Tean v. Collector of Rangoon* (6) was the case of an English mortgage, under the terms of which the rents and profits formed part of the property subject to the mortgage. In *Ajapa Natesa Pandara v. Ramalingam Pillai* (4) it was merely stated that sub-rule (2) was intended to protect third parties and not parties to the suit, but no reasons were given.

It is our plain duty to examine the language of the relevant sections of the Code itself. So far as section 51

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(1) (1912) 16 C.W.N., 997.

(3) (1913) 18 C.W.N., 537.

(5) A.I.R., 1925 Lah., 590.

(2) A.I.R., 1922 Lah., 444.

(4) (1912) 20 Indian Cases, 767.

(6) (1934) I.L.R., 12 Ran., 437.

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is concerned, it does not apply to the present case, because we are not dealing with the matter in any execution proceeding. Nevertheless it may be pointed out that all that the section does is to enumerate in general terms the various modes in which the court may in its discretion order the execution of the decree according as the nature of the relief granted may require. The legislature has taken care to preface the section with the words "subject to such conditions and limitations as may be prescribed". It is obvious that there is no wide and unrestricted jurisdiction to order execution in every case in all the ways indicated therein. The jurisdiction has to be exercised subject to such conditions and limitations as may be prescribed by the rules in the following schedule. Thus even section 51 would be governed by order XL, rule 1. No one could suggest that where a decree orders the sale of a particular property, the executing court could direct its delivery specifically, or direct the arrest or detention of the defendant in person. Obviously all the various modes mentioned in section 51 are not open to an executing court in every case; it is to be guided by the procedure laid down in the schedule, and must resort to the method appropriate to each case.

It is section 94(d) which is more relevant. Under it a court has power to appoint a receiver of any property, and enforce the performance of his duties by attaching and selling his properties. But here again, no wide powers have been conferred on courts. Section 94 in itself really confers no such power at all, because it expressly contains the words "if it is so prescribed," i.e., prescribed by the rules in the schedule. Obviously the legislature intended that the courts should not assume any power on the ground that it is inherent in them and exercise them when there is no express provision in the rules themselves. There is often too great a temptation to treat powers of interference as inherent

in courts. The legislature has thought it fit to create a safeguard against it.

The authority to appoint a receiver is prescribed in order XL, rule 1. A civil court cannot, therefore, act outside that rule. Rule 1 empowers a court, where it appears to it to be just and convenient, (a) to appoint a receiver of any property, whether before or after a decree: (b) to remove any person from the possession or custody of the property; (c) to commit the same to the possession, custody or management of the receiver; and (d) to confer upon the receiver certain powers. If sub-rule (1) had stood by itself, the power would have been unrestricted. But sub-rule (2) runs as follows: "Nothing in this rule shall authorise the court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove." The general power under sub-rule (1) has, therefore, been curtailed by sub-rule (2). Both the sub-rules must be read together as forming part and parcel of one rule. It is impossible to separate them so as to apply the one and ignore the other. It necessarily follows that there is no authority in a court whatsoever to remove from the possession or custody of property *any person* whom any party to the suit *has not a present right so to remove*. It is not easy to see how in some cases the appointment of a receiver was ordered although no party to the suit had a present right so to remove the person in possession or custody of the property. The language of sub-rule (2) is plain, and there is no escape from it. In order to interpret the rule we must give the proper and ordinary meaning to the words used therein, and not interpolate into the rule some new words and then interpret the rule in the light of the new words so introduced. The plain words in sub-rule (2) are "any person". Is there any justification for adding the words "other than the parties to the suit" immediately after these words? The legislature has not only used the expression "a person", but

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has emphasised it still further by using the words "*any person*". When the word "*any*" is there, can we seriously say that it means only persons other than the parties to the suit? To take such words to be implied there, would be to nullify the force of the word "*any*" almost completely. The words in my opinion are general, and have been used in a wide sense, and are fully comprehensive to include both persons who are parties and persons who are non-parties. It is difficult to understand how the meaning of these general words can be restricted to non-parties only.

That such a restriction would be improper is conclusively shown, to my mind, by the circumstance that sub-rule (2) is really related to sub-rule (1)(b) where the same words "*any person*" are also used. Curiously enough this fact has not been noted in any of the judgments holding the contrary view. Can it be seriously suggested that the words "*any person*" have a different meaning in rule (1)(b) from what they have in sub-rule (2)? It is a well settled rule of interpretation that the same expression used in the same section is to be given the same meaning. Now it is utterly impossible to hold that the words "*any person*" in sub-rule (1)(b) mean "*any person other than a party to the suit*". Such an interpretation would completely nullify the effect of sub-rule (1). There is in my opinion no option but to hold that the words "*any person*" therein are general and include parties to the suit. Once that has to be conceded, there is no option whatsoever but to hold that the same words in sub-rule (2) are equally general and include parties to the suit. It would be stultifying oneself to say that the words "*any person*" in sub-rule (1)(b) mean any person whether a party or not a party, whereas the same words in sub-rule (2) mean only a person who is not a party to the suit. In my opinion such a contradictory interpretation is an impossible one.



Another difficulty in holding the contrary view is that it can be only in rare cases, if in any at all, that a third party would be dispossessed by the order of a court. The injustice of it is obvious even if inconvenience be not clear. If a third party has put forward a claim of his own then it is grossly unjust to him that before his claim has been adjudicated by a competent court of law he should be dispossessed by another court hearing a case to which he is not a party and the property in his possession handed over to a receiver appointed in that suit. I am aware that the Calcutta High Court has even gone to the length of holding that such an order can be made: See *Hudson v. Morgan* (1). But faced with the apparent injustice of the order it has felt compelled to lay down that there should be some sort of a preliminary inquiry. I should have thought that even if it be convenient to the mortgagee, it would be grossly unjust to the third party to order his property to be seized even though he be putting forward a *bona fide* claim of title which has not yet been thoroughly adjudicated upon in a proper court of law. It is difficult to see how it would be "just" to dispossess him after a summary inquiry. And if it is not just, then the appointment would be contrary to the opening words of the rule. If the third party were a mere licensee or a tenant whose term had expired the position might be different.

It seems to me that to confine the prohibition contained in sub-rule (2) to non-parties only would be to put a forced interpretation on the sub-rule by assuming without any adequate grounds that certain words which do not occur there are necessarily implied. I am unable to agree that this is a proper method of interpretation. There is no need for a High Court to put on a strained interpretation. If it feels that the rule does not work fairly, the High Court can get the rule itself amended easily. So long as it stands, its language must be given its full effect.

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The provisions of sub-rule (2) have not been made a part of sub-rule (1)(b) only, but added separately. It follows that sub-rule (2) must be read as part of rule 1 and controls the whole of sub-rule (1). Accordingly the powers conferred by sub-rule (1) cannot be exercised where they come in conflict with the provisions of sub-rule (2).

My conclusions can be summarised by paraphrasing order XL, rule 1 as follows: Where it appears to the court to be *just and convenient*, the court may by order (a) appoint a receiver of any property whether before or after decree *in any suit*, (b) remove any person, whether *a party to the suit or not a party*, from the possession or custody of the property, provided his dispossession is in the circumstances *not unjust to him*, and provided further that *any party to the suit has a present right so to remove him*, (c) commit the same property to the possession, custody or management of the receiver, *provided that any party to the suit has a present right to remove the person in possession or custody thereof*, (d) confer upon the receiver all or some of the powers (i) as to bringing and defending suits, realisation of property (for example, recovery of debts), and the execution of documents as the owner himself has, (ii) for the management, protection, preservation and improvement of the property, and (iii) the collection of rents and profits thereof, the application and disposal of such rents and profits, *provided no person is removed from the possession or custody of the property whom any party to the suit has not a present right so to remove*.

My answer to the question referred to us, therefore, is that although there is no objection to the mere appointment of a receiver of any property, the court can not remove from the possession or custody of the property any person, whether a party to the suit or not, whom any party to the suit has not a present right so to remove.

THOM, J.:—I concur. The answer to the question referred turns on a sound interpretation of order XL.

rule 1(2). The terms of this provision are perfectly plain and simple. The expression "any person" obviously includes *all* persons, whether parties to the suit or not. If the words are given their natural meaning it is not open to the courts to appoint a receiver to mortgaged property if there be no party to the suit who has a right to have the mortgagor removed from possession. Where the courts have appointed a receiver in cases where no party to the suit had a present right to remove the mortgagor, they have not acted in strict compliance with the provisions of the statute. They have legislated. They have introduced into the provision after the words "any person" the further words "not a party to the suit". What is the practice in other countries or what may appear to the courts to be reasonable, expedient or equitable are irrelevant considerations when the words of the statute are plain. The courts, it is true, may introduce words which are not in the statute or ignore words which are there if strictly to interpret a particular provision, giving every word its full and natural meaning, would lead to an obvious absurdity or to a result repugnant to the general policy of the Act or clear intention of the legislature. Obviously it cannot be contended that the interpretation of order XL, rule 1(2) according to the plain meaning of its wording would entail either of such consequences.

In the result I agree in answering the question referred as the learned CHIEF JUSTICE suggests.

RACHHPAL SINGH, J.:—The question which has been referred to a Full Bench for an expression of opinion is: "Under the provisions of the Civil Procedure Code, is it competent to appoint a receiver of a mortgaged property, pending the decision of an appeal against a mortgage decree?"

The applicant instituted a suit against the opposite party on the basis of a mortgage deed and obtained a preliminary decree for sale on the 8th of September, 1934. Against that decree the defendants have preferred an appeal to this Court, which is still pending.

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The money due on the mortgage decree was not paid and the mortgagee has obtained a final decree for sale. Before the final decree was obtained by the mortgagee, he put in an application in this Court praying for the appointment of a receiver of the mortgaged property on the allegation that since the institution of the suit upon the basis of the mortgage deed the defendants have been mining certain stone quarries at an abnormal rate with the result that the value of the mortgaged property was depreciating. The defendants opposed the application and contended that this Court had no power to appoint a receiver in a mortgage suit. The learned Judges before whom the application made by the mortgagee in this Court for the appointment of a receiver was pending have referred the above mentioned question for the opinion of a Full Bench.

At the very outset it may be pointed out that the present application made by the mortgagee is not an application in the execution department but is an application made to a court in a pending suit between the parties.

The determination of the question raised before us depends on the construction to be placed on the provisions of order XL, rule 1. Two conflicting interpretations are sought to be placed on the provisions of rule 1, order XL, before us. The decision as to which of the interpretations is correct would mainly depend on the construction which we place on rule 1, sub-clause (b) and sub-rule (2).

Learned counsel for the applicant has urged before us very strongly that clause (b) relates to third persons not parties to the suit and, therefore, sub-clause (2) of the rule can have no application to parties to the suit.

In support of his contention learned counsel for the applicant has referred us to several cases decided by some of the High Courts. I proceed to consider these cases.

In *Hudson v. Morgan* (1), which was decided when the Civil Procedure Code of 1882 was in force, a Bench

(1) (1909) I.L.R., 36 Cal., 713 (720-1).

of two learned Judges of the Calcutta High Court while dealing with this question made the following observations: "In determining whether the court should remove from possession or custody of property under attachment any person who is not a party to the litigation, the test to be applied is whether the parties to the suit or some or one of them have or has a present right so to remove him. If the intention of the legislature had been that a person who was not a party to the suit should not, under any circumstances, be deprived of possession of the disputed properties, the Code would have made an appropriate provision to that effect. On the other hand, the Code expressly provides for the test to be applied in cases of controversy between the receiver and a stranger to the suit."

Another case in which a similar view was taken is *Kumar Satya Narain Singh v. Rani Keshabati Kumari* (1). At page 538 the court expressed the following opinion: "Order XL, rule 1(2), for instance, clearly refers to a case of removal of property from the possession or custody of a person other than the parties to the suit."

A similar view was expressed in *Paras Ram v. Puran Mal Ditta Mal* (2), and it was held that sub-rule (2) of rule 1, order XL, refers to the case of a person other than a party to the suit and does not debar the court from removing one of the parties to the suit from the possession of the property and that there is nothing in rule 1 which excludes mortgage suits from its operation and a receiver can therefore be appointed in a mortgage suit.

I may also refer in this connection to the case of *Ajapa Natesa Pandara v. Ramalingam Pillai* (3), where two learned Judges of the Madras High Court had expressed an opinion that sub-rule (2), rule 1, order XL, was intended to protect third persons not parties to the suit.

(1) (1913) 18 C.W.N., 537.

(2) A.I.R., 1925 Lah., 590.

(3) (1912) 20 Indian Cases, 767.

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*Mohammad Ishaq v. Om Parkash* (1) is a case which was decided by a Bench of this Court consisting of MUKERJI, A.C.J., and myself. This was a case in the execution department. The following observations were made by us in our judgment: "It has, however, been contended that the order passed by the learned Judge militates against sub-rule (2) of rule 1 of order XL of the Civil Procedure Code. The argument is that as the decree-holder is not entitled to remove the plaintiff from possession of the property, the court was not authorised to appoint a receiver of the property. This, in our opinion, is a very narrow construction of sub-rule (2). If this construction were good, there would be no case whatsoever in which a receiver could be appointed. All that sub-rule (2) means is that where any of the parties who are subject to the jurisdiction of the court has no right to remove a third party from possession, that third party shall be allowed to remain in possession. The parties to the suit being subject to the jurisdiction of the court can raise no objection whatsoever to its order for the appointment of a receiver." The view taken in this Allahabad case is in conflict with the view taken in some of the previous cases decided by this Court to which a reference would be made shortly. I wish to point out that in the arguments addressed to us at the hearing of the above mentioned case these previous cases were not brought to our notice, otherwise we would have made a mention of them in our judgment.

Now I may mention the cases in which an opposite view was taken.

In *Gobind Ram v. Jwala Pershad* (2) a Bench of two learned Judges of this Court made the following observations: "A mortgagor, where the mortgage is a simple mortgage, is entitled to remain in possession of the mortgaged property until such time as that property has been brought to sale in due course of law. Order XL. rule 1, provides for the appointment of a receiver

(1) [1933] A.L.J., 51.

(2) (1917) 43 Indian Cases, 533.

by the court. It has enacted that where it appears to the court to be just and convenient a receiver may be appointed. Clause (2) provides that nothing in the rule shall authorise the court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove. It seems to us abundantly clear that neither the plaintiff nor the prior incumbrancer has any present right to remove the mortgagor from possession of the mortgaged property."

Another case on the point is *Makhan Lal v. Mushtaq Ali* (1), in which WALSH and BANERJI, JJ., gave expression to a similar view.

The latest case of this Court on the point is *Ram Prasad v. Bishambhar Nath* (2). In that case it was held that where a plaintiff in a mortgage suit has no right to a personal decree he can not apply for enforcement of personal remedies and that his remedy is limited to bringing the mortgaged property to sale and he can only obtain a remedy from the date of the auction sale. Until that auction sale he has no right to take possession of the property or any income of the property. In such a case there is no jurisdiction for a court to appoint a receiver.

In *Nrisingha Charan Nandy v. Rajniti Prasad Singh* (3) a Bench of the Patna High Court held that order XL, rule 1 did not apply to mortgage suits and therefore a receiver could not be appointed by a court.

High Courts at Bombay, Calcutta, Madras and Lahore have all definitely held that a receiver can be appointed in a mortgage suit. Most of the cases in which this view was taken are noticed in *Paramasivan Pillai v. Ramasami Chettiar* (4).

After hearing learned arguments addressed to us by Sir Tej Bahadur Sapru for the applicant and Dr. Katju for the opposite party, I have arrived at the conclusion that the observations made by MUKERJI, A.C.J., and

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(1) A.I.R., 1927 All., 419.

(2) [1934] A.L.J., 561.

(3) A.I.R., 1932 Pat., 360.

(4) (1933) I.L.R., 56 Mad., 915.

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myself in *Mohammad Ishaq v. Om Parkash* (1) are not correct. On a consideration of the question I have arrived at the conclusion that according to the provisions of order XL, rule 1, a court has no power to remove from possession a person whom the person making the application has no present right to dispossess. In other words, I have come to the conclusion that clause (b) relates to all persons, including parties to the suit. I am of opinion that the view taken in *Gobind Ram v. Jwala Pershad* (2), which has prevailed in this Court for a number of years, should be followed. Rule 1, order XL, first enacts that a court has full power to appoint a receiver of any property whether before or after decree. Clause (b) provides that in exercise of that power the court can pass an order removing any person from the possession or custody of the property and under clause (c) it has power to put it in possession of the receiver. The words used in clause (b) are "any person", and in my opinion they refer not only to third parties as contended on behalf of the applicant but also include parties to the suit. Sub-rule (2) places a limitation on the powers of the court in the matter of removing "any person" from the possession or custody of the property. It enacts that nothing in this rule shall authorise the court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove. The expression "any person" used in sub-rule (2) includes parties to the suit and not only third parties. Under rule 1, the court has power to remove from possession not only parties to the suit but also third parties and therefore when a party to the suit applies that the opposite party should be removed from the possession by the appointment of a receiver, then the person sought to be dispossessed is entitled to resist the prayer for his dispossession on the ground that the party praying for his dispossession has not a present right to remove him from possession.

(1) [1933] A.L.J., 51.

(2) (1917) 43 Indian Cases, 533.

For the reasons given above I am of opinion that where a party to a suit who is sought to be dispossessed is a simple mortgagor in possession then the court has no power to appoint a receiver and to order his dispossession under the provisions of rule 1, order XL of the Civil Procedure Code. A simple mortgagor has a right to remain in possession and to appropriate the profits of the mortgaged property till the sale has actually taken place and that right can not be defeated by the appointment of a receiver. If a mortgagee who has obtained a decree finds that his mortgagor is causing injury which would diminish the value of the mortgaged property, then I apprehend that his only remedy is to proceed under the provisions of order XXXIX of the Civil Procedure Code. On the other hand, in a suit for foreclosure the court will have power to appoint a receiver and to remove the mortgagor from possession. The reason is that under the terms of the mortgage the mortgagee has a present right to dispossess the mortgagor. The mortgagor, under the terms of the mortgage, agrees to put the mortgagee in possession, and if he does not do so the mortgagee is entitled to institute a suit for possession and in that suit it is open to him to make an application for the appointment of a receiver. In a suit for foreclosure the provisions of sub-rule (2), order XL, will not help the mortgagor. With the utmost respect, I do not agree with the general proposition laid down in *Makhan Lal v. Mushtaq Ali* (1), that the provisions of order XXXIV allow no loophole for the application of the procedure provided by order XL to mortgage decrees.

For the reasons given above, I would answer the question referred to the Full Bench as follows: Under the provisions of the Civil Procedure Code it is competent to appoint a receiver of a mortgaged property pending the decision of an appeal against a mortgage decree, provided the party applying for the appointment of a

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(1) A.I.R., 1927 All., 419.



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receiver can establish that he has a present right to remove the opposite party from possession and custody of the mortgaged property.

The Division Bench, which had referred the question to the Full Bench, then passed the following order:

THOM and ALLSOP, JJ.:—This is an application in which the Court is prayed to appoint a receiver of the mortgaged property in suit. In view of the decision of the Full Bench, in which it was held that the Court had no jurisdiction to appoint a receiver to mortgaged properties in the circumstances which obtain in the present suit, this application is dismissed with costs.

### APPELLATE CIVIL

*Before Mr. Justice Bajpai*

1936  
March. 11

UPPER DOAB SUGAR MILLS, LTD. (APPLICANT)  
v. DAULAT RAM (OPPOSITE-PARTY)\*

*Workmen's Compensation Act (VIII of 1923), sections 2(g) and 4(1)(C); schedule I—"Permanent partial disablement"—Index and middle fingers of right hand crushed and had to be amputated—Loss of use of the other fingers—Calculation of compensation.*

Having regard to the definition of "permanent partial disablement" in section 2(g) of the Workmen's Compensation Act, what the court has got to see is whether the earning capacity of the workman has been reduced in every employment which he was capable of undertaking at the time of the accident and not merely the particular employment in which he was engaged at the time of the accident resulting in the disablement. So, where a workman, employed as a blacksmith fitter, had the index and the middle fingers of his right hand crushed while on duty so that they had to be amputated, and the finding of the Commissioner was that he had become permanently incapable of performing the duties of a blacksmith fitter with that hand, it was *held* that the workman was not entitled to compensation

\*First Appeal No. 67 of 1935, from an order of N. C. Mehta, District Magistrate of Muzaffarnagar, dated the 19th of February, 1935.

calculated as for the loss of the thumb and all the fingers of the right hand, in accordance with section 4(1)C and schedule I of the Act, unless upon a further finding that there was a complete and permanent loss of the use of the thumb and the remaining fingers of the hand, which would be equivalent, according to the note to schedule I. to the loss of the thumb and the fingers.

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Mr. *Basudeva Mukerji*, for the appellant.

Mr. *Ram Nama Prasad*, for the respondent.

BAJPAI, J.:—This is an appeal under section 30 of the Workmen's Compensation Act (Act VIII of 1923) against the order of the Commissioner of Labour awarding 50 per cent. of Rs.1,890 to Daulat Ram against the Upper Doab Sugar Mills, Ltd., Muzaffarnagar. The facts of the case are that Daulat Ram was employed as a blacksmith in the factory of the Sugar Mills and he lost the index and middle fingers of his right hand in an accident on the 14th of October, 1934. The compensation was awarded by the Commissioner for Workmen's Compensation under section 4 of the Act.

It was agreed between the parties that Rs.45 were the emoluments of Daulat Ram, fitter, including all perquisites, and it is clear that Rs.1,890 would be the correct figure under sub-section (1)B of section 4 in the case of permanent total disablement. The percentage has now got to be worked out under the provisions of schedule I, as this is a case of permanent partial disablement. The case for the Mills is that as the employee has lost his index finger he is entitled to 10 per cent. of Rs.1,890 and as he has lost one other finger he is further entitled to another 5 per cent. of Rs.1,890. The contention is that Daulat Ram should have been awarded 15 per cent. of Rs.1,890 as compensation and the Commissioner has erred in awarding 50 per cent. of Rs.1,890. The latter percentage has obviously been arrived at on the finding that Daulat Ram has lost the use of the right hand. Now in schedule I there is no provision for the loss of a hand, hand being commonly understood as the terminal

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part of the human arm beyond the wrist. In the schedule a provision is made for the loss of thumb and the loss of fingers. On the assumption therefore that Daulat Ram has lost the thumb as well as all the fingers of the right hand the percentage has been correctly assessed by the court below.

The court below refers to the evidence of the Civil Surgeon on the point which is as follows: "His right index and middle fingers crushed completely while on duty . . . necessitating their amputation. His right hand has become permanently disabled and he is incapable of performing his duties of a blacksmith fitter with that hand." The Commissioner for Workmen's Compensation then says: "I have myself examined the injured hand and am satisfied that the Civil Surgeon's report is absolutely correct in its conclusions regarding the loss of the use of the right hand." If this finding of the court below that Daulat Ram has lost the use of the right hand be not vitiated by some misdirection of law the decision appealed against would be quite correct and could not be challenged under section 30 of the Workmen's Compensation Act which provides that no appeal shall lie against any order passed under the Act unless a substantial question of law is involved in the appeal.

It is, however, said that there is a clear misdirection in the finding of the court below and the question of law that arises is not only of importance in connection with this particular case but has a general effect on a number of other cases. The argument is that although under the note to schedule I complete and permanent loss of the use of any limb or member referred to in the schedule shall be deemed to be the equivalent of the loss of that limb or member, yet the Civil Surgeon while considering the question of the loss of the use of any limb or member (the hand in the present case) paid undue attention to the fact as to whether by reason of the injury the employee was disabled from performing

his duties as a blacksmith fitter with the hand and not merely from performing them in connection with every employment which he was capable of undertaking at the time of the accident. It is said that the note of the Civil Surgeon amounts to this that the employee is incapable of performing his duties of a blacksmith fitter with the right hand and in that sense his right hand has become permanently disabled. It is then said that the finding of the court below that the Civil Surgeon's report is absolutely correct in its conclusions regarding the loss of the use of the right hand also amounts to this that that court is of the opinion that the employee is incapable of performing his duties of a blacksmith fitter with that hand and not that the right hand has become useless for all purposes. There is some force in this contention and I think that I should have a definite finding from the court below after I have explained what I consider to be the law on the subject.

The compensation is allowable to the opposite party in the present case under section 4, sub-clause (1)C. Permanent partial disablement has been defined in section 2(g) as meaning such disablement as reduces the earning capacity of a workman in every employment which he was capable of undertaking at the time of the accident. What therefore the court has got to see in the case of a permanent partial disablement is the fact as to whether the earning capacity of the workman has been reduced in every employment which he was capable of undertaking at the time of the accident and not merely the particular employment in which he was engaged at the time of the accident resulting in the disablement. It is, therefore, conceivable that although because of the loss of the index and the middle fingers the workman was disabled from performing his duties of a blacksmith fitter with his hand he has not been incapacitated from undertaking any other employment, and in that other employ-

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ment the rest of the hand, namely the thumb and the other two fingers, might well be utilised. This seems to be apparent also from schedule I as well. According to that the loss of thumb requires a compensation at the rate of 25 per cent., the index finger at the rate of 10 per cent. and the other fingers at the rate of 5 per cent. It is clear that the thumb and the index finger have peculiar values and the other fingers have lesser values and unless in the present case the thumb and the other fingers have also lost their use for the purpose of every employment which the opposite party was capable of undertaking at the time of the accident the compensation has been awarded at an exaggerated percentage. At the same time it may well be that the court below intended to find that there was a permanent loss of the use of the thumb and all the fingers for all practical purposes and in that event the order of the court below would be perfectly right. I must, therefore, have a clear finding on the following issue:

Has Daulat Ram lost completely and permanently the use of the thumb and the other fingers of the right hand as to reduce his earning capacity in every employment which he was capable of undertaking at the time of the accident?

Parties will be at liberty to produce evidence relevant to this issue. The court below is requested to return its finding within three months and on return the usual ten days will be allowed for objections.

BAJPAI, J.:—By my order, dated the 14th of October, 1935, I remitted an issue to the court below for a definite finding on the same. I was then of the opinion that the court below had probably misdirected itself on a question of law and that in any event it was necessary that there should be a clear finding in order to arrive at a correct decision. The court below has now returned its finding, and although no written objections have been taken, it has been argued by learned counsel for the appellant that on the evidence all that is clear

is that the workman cannot hold a small object with the right hand. On the entire evidence the Commissioner for Workmen's Compensation has come to the conclusion that the earning capacity of the workman in every employment which he was capable of undertaking at the time of the accident has been reduced to nothing and that the workman has lost completely and permanently the use of the thumb and the other fingers of the right hand. It is not possible for me to go behind this clear finding of fact, and, accepting the same, I dismiss this appeal with costs because the finding concludes the matter.

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Before Sir Shah Muhammad Sulaiman, Chief Justice, and  
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MURLI AND OTHERS (DEFENDANTS) v. HANUMAN PRASAD  
AND ANOTHER (PLAINTIFFS)\*

1936  
March, 12

*Riparian owners—Natural rights of user in respect of natural streams—Reasonable and equitable user—Damming up the river for the purpose of a mill—Whether material injury caused thereby to a riparian owner higher up the stream in using it for his own mill—Question of degree—Suit for damages—Prescriptive rights and Natural rights, scope of—Easements Act (V of 1882), sections 7, illustration (h), 23 and 29, illustration (a).*

All that the law relating to the natural rights of riparian owners to use the water of a natural stream requires of a party, by or over whose land the stream passes, is that he should use the water in a reasonable manner, and so as not to destroy or render useless or materially diminish or affect the application of the water by the proprietors above or below him on the stream. He has a right to the use of it for any purpose, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition he may dam up the stream for the purpose of a mill, but not if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury. This principle has been adopted in section 7, illustration (h), of the Easements Act.

\*Appeal No. 71 of 1935, under section 10 of the Letters Patent.

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The plaintiff and the defendant were riparian owners each of whom was utilising the water of a flowing river, by means of dams and sluices, for driving the wheels of his flour mill. The defendant's mill was about two miles further down the stream than the plaintiff's mill. Later, the defendant raised the height of his dam and sluices, with the result that the water accumulated at the plaintiff's causeway and the level of the water near the blades of the plaintiff's mill was raised by 11 inches, causing a loss of about 23 per cent. of the available power. The plaintiff sued for damages; the right claimed by him was not a prescriptive right, as his mill had been in existence for less than 20 years, but the natural right of riparian owners: *Held*, that the act of the defendant was not such an interference with the natural rights of the plaintiff as would give rise to a claim for damages, as it did not prevent the plaintiff from exercising his natural right of making use of the water for the purpose of a mill; all that it had done was to cause a slight diminution in the efficiency of the existing mill of the plaintiff, which could obviously be remedied by raising his mill and, if necessary, his dam by a corresponding height of 11 inches. Had the plaintiff already acquired a prescriptive right to use that particular mill in that particular manner in which he had been using it, only then could the suit for damages have been brought. In the absence of such a prescriptive right, the plaintiff had only the natural right to have a mill on the river and to use the water to work it; and the act of the defendant did not destroy or prevent the exercise of such natural right of the plaintiff. A right to the continuance of particular conditions of the water of a stream for the working of a particular mill could be acquired by prescription, and was not a natural right, as would appear from section 29, illustration (a) of the Easements Act.

Messrs. *Damodar Das* and *Panna Lal*, for the appellants.

Mr. S. S. *Shastri*, for the respondents.

SULAIMAN, C.J., and BENNET, J.:—This is a Letters Patent appeal by the defendants against the decree of a learned single Judge of this Court restoring the decree of the trial court in favour of the plaintiffs. The plaintiffs brought a suit for damages caused to the working of their flour mills on the river Pasoni in Banda district by the raising of the height of a bund two miles further

down the river for a similar mill by the defendants. The findings of fact of the lower appellate court are that the defendants had raised the dam and sluices. "It is proved by the evidence . . . that on account of accumulation of water near their blades plaintiffs' mills do not work properly" and that "on account of raising of defendants' dam, water accumulated at the causeway" and that by raising their dam the water below the plaintiffs' mill was raised 11 inches and plaintiffs would therefore lose about 23 per cent. of the available power and plaintiffs' mill would not work efficiently. The lower court pointed out that plaintiffs did not state whether they based their claim on easement or on natural rights. Paragraph 4 of the plaint stated that the mills of the plaintiffs had been working for 15 or 16 years. This period was less than the 20 years required for an easement and therefore the plaintiffs did not claim that they had a right of easement. The plaintiffs argued that they had a natural right. The court below found that plaintiffs had no natural right to dam up the river and to divert the flow of water for the working of their mills, that such rights could be acquired by prescription but could not be enforced as a natural right and that this was not in connection with riparian tenement. The learned single Judge has relied on a passage in *Wright v. Howard* (1), and a passage at page 99 is quoted which stated in regard to a river:

"But each proprietor of land on the banks has a right to use it; consequently all the proprietors have an equal right; and therefore no one of them can make such an use of it as will prevent any of the others from having an equal use of the stream when it reaches them. Every proprietor may divert the water for the purpose, for example, of turning a mill; but then he must carry the water back into the stream, so that the other proprietors may in their turn have the benefit of it. His use of the stream must not interfere with the equal common right of his neighbours; he must not injure either those whose lands lie below him on the banks of the river or

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those whose lands lie above him. Injury may be done to the proprietors below him by diminishing the quantity of water which descends to them; it may be done to those above him by returning the water upon them so as to overflow their lands, or to disturb any of the operations in which they may have occasion to use the water, as for example by diminishing the extent of its fall."

We would refer to a later ruling, *Embrey v. Owen* (1), where it is laid down:

"All that the law requires of the party by or over whose land a stream passes is that he should use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish or affect the application of the water by the proprietors above or below on the stream. He must not shut the gates of his dams and detain the water unreasonably, or let it off in unusual quantities, to the annoyance of his neighbour. Pothier lays down the rule very strictly, that the owner of the upper stream must not raise the water by dams, so as to make it fall with more abundance and rapidity than it would naturally do, and injure the proprietor below. But this rule must not be construed literally, for that would be to deny all valuable use of the water to the riparian proprietors. It must be subjected to the qualifications which have been mentioned, otherwise rivers and streams of water would become utterly useless, either for manufacturing or agricultural purposes."

In *Miner v. Gilmour* (2) it was laid down at page 156 as follows:

"By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he

(1) (1851) 6 Exch., 353 (370 to 371). (2) (1858) 12 Moo. P. C., 131 (156).

thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury."

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This passage has been referred to with approval by Lord HALSBURY in *John White and Sons v. J. & M. White* (1) as follows:

"Lord KINGSDOWN, in *Miner v. Gilmour* (2) stated the rule in terms that have generally been adopted ever since. By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land. Further, he may, subject to the condition that he does not thereby interfere with the rights of other proprietors either above or below him, dam up the stream for the purpose of a mill."

This judgment may be referred to in regard to a question which arose as to whether the dam erected by the plaintiff turned the channel into an artificial stream. The map shows that there is a large rock in the stream and the plaintiff has made a dam using the rock as part of the dam and his mill is apparently worked by the water from one side of his dam so that the mill is actually adjoining the river. On page 80 Lord HALSBURY stated:

"In some curious manner—a manner which it is very difficult to understand—it seems to have been assumed in some of the arguments here that the artificial addition to the natural rock, which, to some extent, forms the dam, has made some difference to the rights of the parties. The right to maintain that artificial addition to the rock may be assumed; but it does not follow that the addition to the rock has in any respect altered the legal relations of the parties."

It is also stated in Gale on Easements, 11th edition, page 262: "It seems that the use of artificial aids (as mill leats, etc.) by a riparian owner does not in any way affect his natural right to the use of the water." On the other hand prescriptive rights are referred to in Gale at page 274: "In the case of water flowing through a natural watercourse with a defined channel, rights may be acquired by prescription which interfere with what

(1) [1906] A.C., 72 (79, 80)

(2) (1858) 12 Moo. P. C., 131 (156)

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would otherwise be the natural rights of other proprietors above and below. A riparian owner may by user acquire a right to use the water in a manner not justified by his natural rights; but such acquired right has no operation against the natural rights of a landowner higher up or lower down the stream, unless the user affects the use such landowner has of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above or below a servient tenement." It appears therefore that the law to apply in the present case is the law applicable to natural streams and not the law applicable to artificial channels. The rights of riparian owners are the subject of paragraphs 620 to 622 in Halsbury's Laws of England, volume 11, page 352 of second edition, and a similar rule is laid down.

Now the evidence in this case establishes that the dam raised by the defendants has caused a rise of 11 inches in the level of the stream below the dam of the plaintiffs. The raising of the level by this small amount does not appear to us to be such an interference with the natural rights of the plaintiffs as would give cause to a right to sue for damages. The natural rights of the plaintiffs as a riparian owner or tenant are to have the use of the water in the stream and they may use such water for the purpose of running a mill. The action of the defendants has not prevented the plaintiffs from making use of the water for the purpose of a mill. All that the action of the defendants has done is to cause a slight diminution in the efficiency of the existing mill of the plaintiffs. The plaintiffs can obviously remedy this matter by raising their mill and, if necessary, their dam by a corresponding height of 11 inches. It would only be, in our opinion, if the plaintiffs had acquired by prescription an easement to use that particular mill in that particular manner that it could be said that a case would lie for damages. The plaintiffs have not acquired any easement in regard to that particular mill. They

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have only got the right to have a mill on the river. The action of the defendants does not prevent the plaintiffs using their natural right. The distinction appears to us to be an important one between the exercise of a natural right and the exercise of that right in a particular manner with a particular machine. Considering the principles laid down in *Embrey v. Owen* (1) we think that the defendants have not acted in an unreasonable manner and have not destroyed or rendered useless the application of the water by the plaintiffs. We think the defendants are not shown to have acted in a manner which would give rise to a claim for damages.

Learned counsel for the respondents referred to *Subramaniya Ayyar v. Ramachandra Rau* (2) and *Perumal v. Ramasami Chetti* (3), but in our opinion those rulings have no bearing on the point. The principles which we have enunciated from the English rulings have been adopted in the Indian Easements Act. Section 7(b) sets out the following natural right: "The right of every owner of immovable property (subject to any law for the time being in force) to enjoy, without disturbance by another, the natural advantages arising from its situation. . . Illustration (h). The right of every owner of land that the water of every natural stream which passes by, through, or over his land in a defined natural channel shall be allowed by other persons to flow within such owner's limits without interruption and without material alteration in quantity, direction, force or temperature." But rights to particular conditions of water for a particular mill are acquired by prescription and are not natural rights; see section 29, illustration (a): "A, the owner of a mill, has acquired a prescriptive right to divert to his mill part of the water of a stream. A alters the machinery of his mill. He cannot thereby increase his right to divert water." And similarly in section 23, illustration (a): "A, the

(1) (1851) 6, Exch., 353.

(2) (1877) I.L.R., 1 Mad., 335.

(3) (1887) I.L.R., 11 Mad., 16.

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owner of a saw-mill, has a right to a flow of water sufficient to work the mill. He may convert the saw-mill into a corn-mill, provided that it can be worked by the same amount of water."

Accordingly we allow this Letters Patent appeal and we set aside the decree of the learned single Judge and we restore the decree of the lower appellate court with costs throughout.

## REVISIONAL CIVIL

*Before Mr. Justice Iqbal Ahmad and Mr. Justice Harries*

1936  
March, 16

BRITISH INDIA CORPORATION, LTD. (OPPOSITE-PARTY)  
v. ROBERT MENZIES (APPLICANT)\*

*Companies Act (VII of 1913), section 36—Register of members—Right to obtain a copy—Enforcement of the right by order of company court on a petition—Jurisdiction—Companies Act, section 3—Inherent jurisdiction to order compliance with mandatory provisions of the Act—Mandatory injunction without a regular suit—General Rules (Civil), chapter XIX-A, rule 2.*

Section 3 of the Companies Act provides that the courts specified in that section have jurisdiction under the Companies Act. Accordingly, although in some cases there is no specific provision in the Act as regards the authority of the court to enforce compliance with the provisions creating statutory obligations on companies, nevertheless the courts referred to in section 3 have inherent jurisdiction to pass orders to compel due observance of the statutory obligations of a company and for giving redress to a person aggrieved by an illegal omission or refusal on the part of a company. Where there is a wrong there must be a remedy.

A company court, therefore, has jurisdiction to direct by mandatory order a company to comply with its statutory obligation under section 36(2) of the Companies Act to supply a copy of the register of members to a shareholder on requisition by him. Such jurisdiction cannot be deemed to be expressly or impliedly barred by reason of the circumstance that clause (3) of section 36 provides a penalty by way of fine for non-com-

\*Civil Revision No. 92 of 1936.

pliance with clause (1) or (2) and makes no express provision for the power of the court to order delivery of a copy, though it provides for an order by the court to compel an immediate inspection of the register. The only remedy which the shareholder can have is by way of a mandatory injunction from the company court. The provision of an order for immediate inspection was specially provided only to meet a case of urgency where delay would frustrate the purpose of the inspection.

Although, ordinarily, mandatory and perpetual injunctions can be granted only on a regular suit being filed, yet, as indicated in rule 2 of chapter XIX-A of the General Rules, framed by the High Court under the Companies Act, proceedings for the enforcement of the provisions of the Companies Act are ordinarily to be initiated by petitions presented to the court exercising jurisdiction under that Act. On such a petition being filed such court has jurisdiction to issue a mandatory injunction, where that is the appropriate method to give redress against an infringement of the provisions of the Act.

Sir *Tej Bahadur Sapru* and Messrs. *Nanak Chand* and *Vikramajit Singh*, for the applicant.

Dr. *K. N. Katju* and Mr. *M. N. Kaul*, for the opposite party.

IQBAL AHMAD and HARRIES, JJ.:—The broad question that arises for consideration in the present application in revision is whether a company Judge has jurisdiction to enforce compliance with the provisions of the Indian Companies Act though such power is not expressly conferred on the Judge by the provisions of the Act. In particular, the question for decision is whether a company Judge has jurisdiction to order a company to deliver a copy of the register of members of the company to a shareholder of the company.

There is very little controversy about the facts. The opposite party, Robert Menzies, is a shareholder of the British India Corporation, Ltd. He joined the Corporation in 1920 as a Secretary of the Corporation, and in or about March, 1930, he was, in addition to his duties as Secretary, appointed to act as a Managing Director also. Mr. Menzies held the position of Secre-

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tary and Managing Director of the Corporation till April, 1935, when he went on leave to England. During his absence on leave from India the Corporation informed him that his services were no longer required, as certain retrenchments were being effected on grounds of economy. Mr. Menzies returned to India in the autumn of 1935 and he then, on the 14th of November, made an application to the Corporation for a copy of the register of the members. Some correspondence followed between Mr. Menzies and the officers of the Corporation as regards the amount of fees to be paid by Mr. Menzies on account of the copy and eventually a sum of Rs.500 was placed by Mr. Menzies at the disposal of the Corporation so far back as on the 27th of November, 1935. The Corporation, however, did not furnish the copy to Mr. Menzies and put him off by pretexts which can only be characterised as scandalous if not dishonest.

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After waiting for a considerable time Mr. Menzies did what any one in his position would have done. He sought the protection of the company court and filed an application before the District Judge of Cawnpore praying that the Corporation be ordered to supply him a copy of the names and addresses of the shareholders of the Corporation immediately and also "to deal with them according to law". It may here be mentioned that the petition was filed in the court of the District Judge as in accordance with the proviso to section 3 of the Act the Local Government has, by notification in the local official Gazette, empowered the District Judge of Cawnpore to exercise jurisdiction under the Companies Act. The registered office of the Corporation is within the jurisdiction of the district court of Cawnpore and therefore the petition was filed in the court of the District Judge, on the 22nd of January, 1936. It would be noted that more than two months had by this date elapsed since the request was made by Mr. Menzies for

the first time for a copy of the register of members. The learned District Judge fixed the 31st of January for the disposal of the petition, and notice of the date was given to the opposite parties, viz., the British India Corporation, Ltd.

The petition was brief. It recited the fact of a request having been made by Mr. Menzies for a copy of the register of members being supplied to him and it mentioned the delaying tactics adopted by the opposite parties in complying with what was undoubtedly a reasonable request. . . The opposite parties succeeded on the 31st of January, in getting an adjournment from the District Judge on the ground that they were not ready with their case. The learned Judge then fixed the 11th of February, 1936, for the hearing of the application and on that date the opposite parties filed a reply to the petition of Mr. Menzies. We are not concerned with that portion of the reply which deals with the question whether Mr. Menzies has a right to claim damages from the Corporation on account of his alleged wrongful dismissal. So far as the request for a copy being furnished to Mr. Menzies is concerned it was pointed out in the reply that the opposite parties had promised to supply the copy to the petitioner as soon as it was ready, and they had issued orders for the copy to be prepared without delay. . . The Managing Directors are men of education and presumably men with considerable experience in business matters and they ought to have realised that it should not have taken more than two or three days to supply to Mr. Menzies the copy that he asked for. They, however, chose to have the question of the jurisdiction of the District Judge to enforce compliance with the provisions of section 36 debated and discussed in his court. The learned Judge held that he had jurisdiction to direct the opposite parties to hand over the copy to the petitioner and accordingly directed the opposite parties to supply the copy to the petitioner within one week

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from the date of his order, viz., from the 13th of February, 1936. By this time three months had elapsed from the day on which Mr. Menzies had requested for a copy being given to him. The copy was not yet ready. At any rate the court's order was not complied with and the copy was not handed over to Mr. Menzies.

The opposite parties then came in revision to this Court and successfully applied for a stay order, with the result that the operation of the order of the District Judge was stayed till the decision of the application in revision filed by the opposite parties.

The application has been argued at some length today. At the very outset we inquired from the learned counsel for the applicants whether the copy was now ready and could be handed over to Mr. Menzies. The answer was in the negative. It is clear that if the reasons communicated to Mr. Menzies from time to time for the delay in the preparation of the copy were genuine, one would have expected the copy to be ready by this time. The fact that the opposite parties were not prepared to hand over the copy even now is proof positive of the fact that they intended from the very outset not to let Mr. Menzies have a copy of the register of members.

The question, however, remains and has to be decided whether the order of the District Judge was, as contended by learned counsel for the applicants, without jurisdiction.

It is provided by section 36(1) of the Act that the register of members of a company shall be kept at the registered office of the company and shall, except when closed under the provisions of the Act, be open to inspection by any member during business hours, subject to certain restrictions. Clause (2) of section 36 provides that any member of the company or other person may require a copy of the register or any part thereof to be handed over to him on payment of a certain amount on account of copying charges.

The penalty for non-compliance with clauses (1) and (2) of section 36 is provided for by clause (3) of the section and as the argument of the learned counsel for the applicants has turned on the wording of that clause it is necessary to quote the same. It runs as follows: "If any inspection or copy required under this section is refused, the company shall be liable for each refusal to a fine not exceeding Rs.20 and to a further fine not exceeding Rs.20 for every day during which the refusal continues, and every officer of the company who knowingly authorises or permits the refusal shall be liable to the like penalty, and the court may by order compel an immediate inspection of the register." The argument is that as the only penalty laid down by the Act for refusing to allow inspection or to hand over a copy of the register is the imposition of fine provided for by section 36(3), and as the court is not vested with the authority to direct the company to furnish a copy of the register to a person applying for the same, the District Judge had no jurisdiction to pass the order that he did. In this connection particular emphasis is laid on the concluding portion of clause (3) of section 36 which provides that "the court may by order compel an immediate inspection of the register". It is pointed out that though clause (3) lays down the penalty both for the failure to allow inspection or to furnish a copy of the register and goes on to vest the court with the jurisdiction to order inspection of the register, it is silent as to the powers of the court to order a copy of the register to be given. It is said that in the absence of a specific provision authorising the court to order a copy to be given the court has no jurisdiction to direct a company to supply a copy of the register of members even though it may have failed to comply with the mandatory provisions of section 36(1) of the Act. We are wholly unable to agree with this contention.

It is distinctly provided by section 3 that the courts specified in that section have jurisdiction under the

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Companies Act. A reference to the Act shows that there are various statutory obligations cast upon companies by the Act and that with respect to most of those obligations penalties have been provided for by the Act. There is, however, in many cases no specific provision in the Act as regards the authority of the court to enforce compliance with the provisions that define and regulate those obligations. Nevertheless it seems to us that the courts referred to in section 3 of the Act have inherent jurisdiction to compel due observance of the mandatory provisions of the Act. As has been pointed out by the learned District Judge, it is a fundamental principle of legal administration that where the law requires something to be done there must be in existence a court that can directly order it to be done. It is well understood in all systems of civilized jurisprudence that where there is a right there is a remedy. It is conceded on behalf of the applicant that Mr. Menzies had the right to demand and to be furnished with a copy of the register of members of the Corporation. But if the argument of the applicant is pressed to its logical consequences it follows that there was no remedy available to Mr. Menzies for the enforcement of this right. It is needless to say that we cannot credit the legislature with an omission of this description.

Section 31 of the Act requires every company to maintain a register of members and section 32 directs an annual list of members to be prepared by companies. Both these sections lay down the penalty for non-compliance with the provisions of those sections, but there is no provision in those sections expressly authorising the court to direct the preparation of the register of members and the annual list referred to therein. According to the argument of the learned counsel for the applicant the court has no jurisdiction to enforce compliance with the provisions of those sections, however much a company may be in default. To accept this argument would be to render nugatory the provisions

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of the Act and to deny to the court, on which the legislature has expressly conferred jurisdiction under the Act, the power of enforcing compliance with the provisions of the Act. This could never have been the intention of the legislature and we therefore hold that the courts referred to in section 3 of the Act have jurisdiction to pass orders for the enforcement of the statutory obligations of a company and for giving redress to a person aggrieved by an illegal omission on the part of a company.

Mr. Menzies had undoubtedly the right to get the copy applied for. The Corporation was determined from the very outset to deny him that right. Mr. Menzies could have had no other remedy except to seek the protection of the court of the District Judge, which court has the sole jurisdiction in company matters in Cawnpore. The District Judge, therefore, had inherent jurisdiction to direct the copy to be given to Mr. Menzies and his order is not open to any legal objection.

Before leaving this part of the case we may observe that the provision in clause (3) of section 36 authorising the court to compel immediate inspection in no way leads to the conclusion that the jurisdiction of the court to order a copy of the register of members to be given is either expressly or impliedly barred. A reference to clause (1) of section 36 shows that the right to inspect the register is subject to certain limitations, e.g., the inspection can be had only during business hours and subject to such reasonable restrictions as the company in a general meeting may impose. The provision as regards immediate inspection being ordered by the court was presumably inserted in the Act with a view to provide for those contingencies in which the court, for sufficient reasons, is satisfied that the purpose of the inspection will be frustrated unless immediate inspection is ordered.

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The view that we take finds support from the decision in *Davies v. Gas Light and Coke Company* (1). The decision at page 708 is the decision of the Court of Appeal affirming the decision of WARRINGTON, J., which is reported at page 248 of the same volume. It was held in that case that the right given to a shareholder by section 10 of the Companies Clauses Consolidation Act, 1845, to require the company to supply him with a copy of the shareholders' address book is a private right conferred on him by statute by reason of his being a member of the company and not as being a member of the public. It was further held in that case that in the event of the company refusing to supply to a shareholder a copy of the register of members the proper remedy open to the shareholder is either an injunction to restrain the company from continuing to refuse to supply him or an action of mandamus or for a mandatory injunction directing the company to supply him the required copy. In the case before us it is admitted that Mr. Menzies is a shareholder and a director, and, as such, is a member of the Corporation. He, therefore, had the statutory right to demand and to be supplied with a copy of the register of members. This right of Mr. Menzies arose out of his proprietary right as a shareholder of the Corporation. He was, therefore, entitled to the protection of that right. This right was infringed by the Corporation refusing to supply him a copy within a reasonable time, and, therefore, he was entitled to a mandatory injunction directing the Corporation to supply him with the required copy. But it is contended on behalf of the Corporation that as, in accordance with the provisions of the Specific Relief Act, a mandatory injunction can only be prayed for in a suit and granted by a decree, the District Judge of Cawnpore had no jurisdiction, in a summary proceeding of the nature arising out of the petition filed by Mr. Menzies, to grant the mandatory injunction prayed for by him. In our judgment there is no force in this contention. It

(1) [1909] 1 Ch., 708.

may be conceded that ordinarily mandatory and perpetual injunctions can be granted only on a regular suit being filed, but injunctions to ensure compliance with the mandatory provisions of the Companies Act can be granted only by the court having jurisdiction under that Act. It has already been observed that the District Judge of Cawnpore has jurisdiction under the Act. He was, therefore, competent to direct the Corporation by a mandatory injunction to comply with the provisions of section 36. A regular suit by Mr. Menzies for an injunction in a court other than the court of the District Judge could not have been entertained because of the fact that that court could have had no jurisdiction under the Companies Act. This Court has made rules under the Indian Companies Act both for this Court and the courts subordinate thereto and it is laid down by rule 2 of those rules that "Where any district court has been empowered under section 3, clause (1) of Act No. VII of 1913, all petitions shall be presented, applications made to, and proceedings taken under the direction of, the Judge for the time being of the district court within whose jurisdiction the registered office of the company may be situate." We take this rule to indicate that ordinarily proceedings for the enforcement of the provisions of the Companies Act are to be initiated by petitions presented to the court having jurisdiction under the Act. On such a petition being filed the jurisdiction of the court to give effect to the provisions of the Act comes into play, and, as pointed out in the English decision referred to above, one of the appropriate methods for giving redress to a party aggrieved by the omission of a company to comply with the provisions of the Act is to issue a mandatory injunction. The District Judge of Cawnpore had, therefore, on a petition being filed in his court, jurisdiction to order the Corporation to supply the copy to Mr. Menzies.

For the reasons given above we hold that the learned District Judge had jurisdiction to pass the order sought

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to be revised. Indeed we consider that the only possible order under the circumstances was the order passed by the District Judge. We accordingly dismiss this application with costs both here and below. The stay order is discharged.

### APPELLATE CIVIL

*Before Mr. Justice Bennet and Mr. Justice Smith*

1936  
 March, 24

MAKHAN LAL (PLAINTIFF) v. MUFTI TAWASSUL HUSAIN  
 (DEFENDANT)\*

*Agra Tenancy Act (Local Act III of 1926), sections 8, 73, 219—  
 Thekadar—Covenant against reduction of rent upon remis-  
 sion of revenue—Validity.*

A theka granted by a zamindar contained a covenant that the amount fixed as the rent to be paid by the thekadar would not be reduced or affected in any way on account of any remission or suspension of revenue or rent which might be made by the Government:

*Held* that the covenant was valid and was not overridden by section 8(1) of the Agra Tenancy Act, inasmuch as the word "tenant" in that section did not include a thekadar; there was no express provision in section 8 for the inclusion of a thekadar, as required by section 3(6), nor was section 8 one of the five sections mentioned in section 219 as being applicable to thekadars. Accordingly the covenant would override the provisions of section 73, under clause (3) of which a thekadar would be entitled to the benefit of an order of remission or suspension of his rent, passed in consequence of the remission or suspension of revenue.

Messrs. G. Agarwala and Kartar Narain Agarwala, for the appellant.

Mr. A. M. Khwaja, for the respondent.

BENNET and SMITH, JJ.:—This is a first appeal from a decision dated the 10th March, 1932, of an Assistant Collector of the First Class of the Bijnor district. The suit was one under section 132 of the Agra Tenancy Act for recovery of "theke" money, with interest at 12 per

\*First Appeal No. 187 of 1932, from a decree of Mir Ali Raza, Assistant Collector, first class of Bijnor, dated the 10th of March, 1932.

cent., per annum, for the years 1336, 1337 and 1338F., the total amount claimed being Rs.15,871. The learned Assistant Collector has decreed the plaintiff Rs.8,948 with past interest at 12 per cent. per annum, and future interest at 6 per cent. per annum, and proportionate costs. The money was ordered to be paid in two equal instalments at intervals of six months. Against that decision the plaintiff has appealed.

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On the 11th August, 1928, the defendant respondent, Mufti Muhammad Tawassul Husain, executed a usufructuary mortgage in respect of the properties concerned in favour of the plaintiff appellant, Sahu Makhan Lal, for a sum of Rs.1,45,000. On the 24th August, 1928, the mortgagor executed a qabuliat in favour of Sahu Makhan Lal, by which he agreed to hold the property on lease for an annual payment of Rs.13,000. The terms of the lease were that the lessee should pay the Government revenue and cesses, amounting to Rs.4,300 annually, and should pay the balance, Rs.8,700, to the mortgagee lessor. As regards the revenue, it was provided that if it was reduced, enhanced or remitted at any future settlement, or for any other reason, the lessee, and not the lessor, should be affected by any such change. That portion of the qabuliat concludes with the words: "I, the lessee, shall under all circumstances continue to pay the aforesaid amount of profits to the mortgagee zamindar." As regards the rents, it was stipulated in paragraph 6 of the qabuliat that "If, on account of terrestrial or celestial calamities, any remission or suspension be made by the Government, it shall have no effect as against the lessor; I, the lessee, the executant, shall enjoy the benefit and be liable for the loss resulting therefrom, and I shall, as per conditions set forth above, continue to pay the lease money to the mortgagee, the lessor, without raising the aforesaid pleas." The learned Assistant Collector has in framing his accounts deducted from the amount payable to the plaintiff for the year 1336F. a sum of Rs.1,027 in respect



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of remissions of rent said to have been granted in that year, and in the year 1338F. he has similarly deducted a sum of Rs.3,050. In his judgment the learned Assistant Collector took the view that it was only in cases where the remissions of rent were due, as he put it, "to earthly or atmospheric reasons" that the thekadar would not be entitled to make any deductions from the amounts payable by him under the lease. He went on to say that it was only just and equitable that the defendant should be allowed to make deductions where the remissions of rent had been allowed by Government on account of abnormally low prices.

When the appeal was first before us, we found it necessary to make inquiries as to the grounds on which the remissions of rent were, in fact, made in the years 1336 and 1338F. The Collector has now sent us a tabular statement, which shows that in 1336F. remissions of revenue and rent were made in some of the villages in question on account of agricultural calamity, and similar remissions were also made in the year 1338 F. in most of the villages concerned on account of the fall in the prices of agricultural produce. In these circumstances it seems to us to be clear that the deduction made by the learned Assistant Collector in respect of the year 1336 F. ought not to have been made, since the remissions of rent and revenue made in that year were due to agricultural calamity, which is a matter specifically covered by paragraph 6 of the lease. As regards the deductions made in 1338 F. the matter is not so simple. According to section 73(1) of the Agra Tenancy Act (Act III of 1926):—"When for any cause the Local Government, or any authority empowered by it in this behalf, remits or suspends for any period the payment of the whole or any part of the revenue payable in respect of any land, whether such revenue is payable to an assignee or to the Government, a Collector, or, if so empowered by the Local Government, an Assistant Collector of the first class, may order that the

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rents of the tenants holding such land or any portion thereof, mediately or immediately from the landlord, shall be remitted or suspended for the period of such remission or suspension of payment of revenue, to an amount which shall bear the same proportion . . ."

In sub-section (3) of this section it is provided that the word "tenant" includes a thekadar. It is to be observed, however, that in cases where the Local Government or any authority empowered by it remits or suspends for any period the payment of the whole or any part of the revenue, a Collector, or an Assistant Collector of the first class if so empowered, *may order* that the rent of the tenants holding such land shall be remitted or suspended, etc. In the present case, we are not shown that there was any order remitting any portion of the rent payable by the thekadar, the defendant respondent in the present case. His learned counsel has suggested that as this particular point has not come up for consideration until today, we should remit a definite issue to the learned court below for a finding as to whether any remission was granted in the rent of this thekadar in the year 1338F. or not. We do not think that at this stage we ought to remit any such issue. It was the duty of the defendant clearly to plead the provisions of section 73(1) of the Agra Tenancy Act, and to show that his case was covered by those provisions. He did not do so, and in the circumstances we do not see any reason to give him an opportunity to do so now. The result is that in our opinion the deduction of Rs.3,050 made by the Assistant Collector from the money due under the theka for the year 1338 F. should not have been allowed.

A ruling has been produced by learned counsel for the respondent in *Fateh Chand v. Murari Lal* (1). That case is distinguished from the present case by two points. It was under section 51 of the Agra Tenancy Act, II of 1901, which corresponds to the section before us, section

(1) (1924) I.L.R., 46 All., 840.

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73 of the Agra Tenancy Act III of 1926. The case differed from the present case because on page 842 of the ruling it is stated that there was a certificate by the Collector containing an express order that the rent payable by the defendant lessee should be remitted to the extent mentioned therein. There is not any such order in the present case. The second point on which there is a difference is of more general importance, because there has been a change in the law in regard to thekadar. The ruling set out that the contract between the zamindar and the thekadar was overridden by the express provision of law contained in section 51 of the Tenancy Act, and that the stipulation in the lease that rent would be payable irrespective of whether there was any drought or flood or any calamity causing loss of produce in the village was overridden by the provisions of section 51. The ruling referred to the definition in section 4(5) of the Tenancy Act, II of 1901, where it is stated that a "tenant" includes a thekadar. Accordingly, therefore, under that Act section 3(1) applied to a thekadar, and this sub-section stated:—"Notwithstanding anything contained in section 2, nothing in any lease or agreement made between a landholder and a tenant on or after the first day of April, 1900, shall take away or limit any right of the tenant as conferred or recognized by this Act." Therefore the learned Judges in that case were correct in applying section 3(1) and holding that the provision in the lease was overridden by section 51 of Act II of 1901.

We have in the present case a similar provision in the lease, but the law is different. Under Act III of 1926 there is no doubt in section 8(1) a provision:—"Every agreement which purports, or would operate, to restrict a tenant from enforcing or exercising any right conferred on or secured to him by this Act is void to that extent." But the word "tenant" in section 8 no longer includes a thekadar. This is shown by section 3(6), which states: "Tenant" does not include . . . save as otherwise

expressly provided by this Act, a thekadar." Now section 8 does not expressly include a thekadar, and therefore that section cannot be applied to the present lease by a zamindar to a thekadar. The covenant in the lease, therefore, is not affected by the provisions of section 73 of the Agra Tenancy Act of 1926. That section 8 does not apply to a thekadar is further shown by the fact that section 219, which is in the chapter for thekadar, and which sets out certain sections of the Act as applying to thekadar, does not state that section 8 applies to thekadar. It is also provided in section 219(1) that the five sections mentioned therein shall apply to thekadar unless there is an express provision to the contrary in the theka. Therefore the situation has changed with the passing of Act III of 1926, and it is now open to a zamindar to grant a theka which contains provisions contrary to the provisions of Act III of 1926 in regard to tenants. The ruling, therefore, for these two reasons has no application to the present case.

The result of our findings is that the correct figures for the years in suit are as follows. [Calculations were made in accordance with the amount claimed by the plaintiff, no deductions being allowed on the head of remission of rent; and the appeal was decreed with costs.]

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### MISCELLANEOUS CIVIL

*Before Mr. Justice Collister and Mr. Justice Bajpai*

CHAMBER OF COMMERCE, HAPUR (APPLICANT) v.

COMMISSIONER OF INCOME-TAX (OPPOSITE-PARTY)\*

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*Income-tax Act (XI of 1922), sections 4(1), 4(3)(ii), and 6—Association in the nature of a "mutual concern"—Incorporated under section 26 of Companies Act—Members' entrance fees and subscriptions—Receipt of commissions on sales by or through members—Liability to income-tax—Income, profits or gains—Business—Other sources—"Charitable institution"—"Object of general public utility".*

\*Miscellaneous Case No. 637 of 1934.

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An association of merchants of the town of Hapur was registered as a company under section 26 of the Companies Act; it was limited by guarantee, had no share capital, did not exist for earning profits and was prohibited from declaring dividends. The objects of the company were to promote trade and commerce, particularly that of grain and cotton dealers of Hapur, to settle business disputes among them, etc., and also to spend certain sums on charitable objects or objects of public utility. The income consisted of the members' entrance fees and annual subscriptions, as well as a registration fee for each grain-pit and a commission on purchases and sales on forward contracts by or through the members. The company was assessed to income-tax in respect of its income from the registration fees and commissions, but not from the entrance fees and subscriptions paid by the members; and its claim to a deduction on account of certain expenditure on charity towards the maintenance of a hospital was disallowed.

*Held*, on a case stated by the Commissioner of Income-tax regarding the assessment of the company to income-tax—

(1) An association incorporated under section 26 of the Companies Act as a company limited by guarantee, not existing for earning profits, and prohibited under the law from declaring any dividends to its members, is not as such exempt from income-tax and is liable to be assessed to income-tax.

(2) The income derived from the members in the shape of the registration fees and the commissions was not income from any "sources other than business" and did not fall under class (vi) of section 6 of the Income-tax Act. The Commissioner of Income-tax having held that it was not income from "business" and no question on this point having been referred to the High Court, no opinion was expressed as to whether the Commissioner's view was or was not correct.

(3) The company was not a "charitable institution" within the meaning of section 4(3)(ii) of the Income-tax Act and was not as such exempt from income-tax. The ostensible object of the company was to provide facilities of trade and to improve business and this did not come within the phrase "charitable purpose" as defined in the section. As the persons who were benefited were those particular individuals who were members of the association or such outside merchants as elected to do business through the members, it was very doubtful whether it could be said that an object of "general public utility" as

contemplated in the definition was being advanced by the company. Every institution whose object is to benefit the public or a section of the public is not necessarily "charitable". Further, there must be an element of altruism before an institution can be held to be "charitable", i.e. the beneficiaries must not be able to *claim* the benefit; that element was wanting in the present case.

(4) The company could not, apart from other considerations, claim any exemption or deduction *quoad* any money it might have elected to spend on charity.

Messrs. S. K. Dar, K. C. Mital and M. N. Agarwala, for the applicant.

Mr. K. Verma, for the opposite party.

COLLISTER, J.:—This is a case which has been stated by the Income-tax Commissioner under section 66(2) of the Indian Income-Tax Act (XI of 1922). The assessee is the Chamber of Commerce at Hapur and the case relates to two assessment years, 1932-33 and 1933-34. The assessee is a company limited by guarantee, which was registered in 1923 under section 26 of the Indian Companies Act. The objects for which the assessee was incorporated, as set forth in its memorandum and articles of association, are as follows:

(1) To promote and protect the trade, commerce and manufactures of India, and in particular the trade, commerce and manufactures of Hapur and district Meerut.

(2) To promote unity and friendliness amongst all merchants in general, and dealers in grain in particular, in respect of all subjects of common interest.

(3) To establish just and equitable principles in trade and to form a code or codes of practice to simplify and facilitate transaction of business between merchants dealing in grain, cotton, cotton seed, etc., at Hapur and elsewhere, and persons entering into those transactions with them.

(4) To maintain uniformity in rules, regulations and usages of trade.

(5) In case of mutual quarrels or disputes in business to settle them as between members of the association and between parties willing or agreeing to abide by the judgment and decision of the association.

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(6) To consider all questions connected with trade, commerce, manufactures and affecting the rights and privileges of the whole mercantile community, specially dealers in grain and cotton, etc., and to remove all difficulties in a lawful and constitutional manner.

(7) To acquire by purchase, taking on lease or otherwise lands and buildings and all other property, movable and immovable, which the association, for the purposes thereof, may from time to time think proper to acquire.

(8) To sell, improve, manage, develop, exchange, lease, mortgage or otherwise deal with all or any part of the property of the association, or the business of the association.

(9) To co-operate with other associations and chambers similar to this association and to procure from and communicate to any such association such information as may be likely to forward the objects of the association.

(9a) To spend such sums of money as may from time to time be resolved upon by the executive committee or general body of the association on charitable and benevolent objects or objects of public utility with the sanction of the latter.

(10) To do all such other things as may be conducive to the extension of trade, commerce or manufactures or incidental to the attainment of the above objects or any of them.

Article (9a) did not originally occur in the memorandum; it was added in pursuance of a sanction to amend the articles of association which was obtained from the High Court on September the 1st, 1933. Application to that effect was made on the advice of the auditors, who had detected that the assessee was incurring without authority certain expenses in maintaining a hospital.

The income of the assessee is as follows: (1) Rs.10 per member as admission fee; (2) Re.1 per member per annum as subscription; (3) Re.1 as registration fee for each *khatti* or grain-pit; (4) Re.0-2-0 commission on every purchase and sale of 25 tons on forward delivery contracts.

The members of the assessee company are merchants of Hapur, some of whom are commission agents. It appears that the bulk of the income is derived from the

commission which is paid on forward contracts. Any such contract may be entered into by two members *inter se* or it may be entered into by two outsiders or by an outsider and a member; but whenever an outsider is a party to the contract, he has to employ the services of a member of the assessee company who is a commission agent. Each contract is registered in the books of the assessee company, but it can only be registered in the name of a member and it is the member who has to pay the commission. He in his turn recovers it from the outsider or constituent, but so far as the company is concerned it is the member who is responsible for paying the commission.

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The assessee objected that it was not liable to assessment under the Act; but the Income-tax Officer of Meerut overruled that objection and assessed the company to income-tax in respect to commission or registration fees, declining at the same time to make any allowance on account of the expenses incurred in maintaining a hospital. The admission fees and annual subscriptions only were held to be exempt. The assessee appealed on the following grounds:

(1) That it was not an association working for profit and that no part of its income was liable to be distributed in the form of dividends or otherwise.

(2) That its income was derived from its own members in the form of contributions for its maintenance and was as such outside the scope of the Act.

(3) That it did not settle any profit or loss, but simply recorded the transactions and was not concerned with any payments.

(4) That it was incorporated under section 26 of the Companies Act as an association limited by guarantee.

(5) That in any case the Income-tax Officer should have allowed the expenditure on charity.

The Assistant Commissioner of Income-tax dismissed the appeal, and thereupon the assessee moved the Commissioner of Income-tax to state a case and refer certain



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questions of law to this Court. The questions of law set out in their application were as follows:

(1) Whether an association incorporated under section 26 of the Indian Companies Act, as an association limited by guarantee not existing for earning profits, and prohibited under the law from declaring any dividends to its members, is liable to assessment, particularly in view of the fact that no relief under section 48 of the Act is available to such an association, as in case of other associations not incorporated under section 26 of the Indian Companies Act.

(2) Whether the income of the Chamber, derived from its members only, in the shape of a certain fixed amount on each transaction registered in the Chamber, can be deemed to be "income, profits or gains" within the meaning of section 4 of the Act, when such amount is to be spent not for distribution of any profits but for maintenance of its office and carrying out of objects enumerated in the memorandum of association.

(3) Whether the income of the Chamber of Commerce, Hapur, can be deemed to be "income of a religious or charitable institution derived from voluntary contributions or income derived from property held under trust or other legal obligation wholly for religious or charitable purposes" within the meaning of section 4, sub-section (3), clauses (i) and (ii) and as such is exempt from assessment.

(4) Whether "income" of the Chamber is in any event derived from "business" within the meaning of the Income-tax Act.

(5) Whether the expenditure on charity, in accordance with its memorandum of association, even prior to its amendment by the Honourable High Court, is liable to assessment.

The Income-tax Commissioner has, however, only referred questions Nos. 1 to 3 and No. 5 to this Court; he has not thought it necessary to refer question No. 4 because in his opinion the income of the assessee is not

from "business" within the meaning of the Act, and he has accordingly conceded that point in favour of the assessee.

I will now proceed to deal with the questions which have been formulated by the Income-tax Commissioner.

*Question No. 1*—There is no provision in the Act whereby an association incorporated under section 26 of the Indian Companies Act is exempted as such from being assessed to income-tax. In fact, this was admitted before the Income-tax Officer. His assessment order dated 22nd of March, 1934, shows that in the written arguments which were filed before him the following admission found place: "It may be conceded at the outset that the Chamber as such is not exempt from assessment, as it is certainly a company registered under the Indian Companies Act and comes within the scope of section 3 of the Income-tax Act". I agree with the view of the Income-tax Commissioner that there is no exemption in favour of such a company as such, and that the non-applicability of section 48 of the Act is an irrelevant consideration.

*Question No. 2*—As I have already shown, the income of the assessee, apart from admission fees and subscriptions which have been held to be exempt, is of two kinds: it consists (1) in payment of commission and registration fees which are made by members on their own account and (2) in payment of commission which, though made by members, actually comes from the pockets of outsiders. I will first deal with the former category.

Learned counsel for the assessee contends that the Chamber of Commerce at Hapur is a "mutual concern", i.e., an association whose members contribute to a common fund for their mutual benefit and that the payments which are made by its members are on that account exempt from income-tax, being neither income, profits or gains within the meaning of the Act; they are contributions by individual members to a common fund to be utilised by the aggregation of

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members for a common object. He relies on various authorities. The first case to which we are referred is from the House of Lords and dates back to 1889. It is the case of the *New York Life Insurance Company v. Styles* (1). It related to a Mutual Life Insurance Company which had no shares or shareholders; the members were the holders of participating policies, each of whom was entitled to a share of the assets and liable for all losses. A calculation was made by the company of the probable death-rate among the members and of the probable expenses and other liabilities, and the amount claimed for premiums from members was commensurate therewith. An account was annually taken and the greater part of the surplus of such premiums over expenditure referable to these policies was returned to the policy-holders as bonuses, either by addition to the sums insured or in reduction of future premiums. The remainder of the surplus was carried forward as funds in hand to the credit of the general body of the members. It was conceded that the income derived by the company from investments and from all transactions with non-members was assessable to income-tax; but it was held by four out of six of the noble Lords who heard the appeal that no part of the premium income received under participating policies was liable to be assessed to income-tax as profits or gains under schedule D. Schedule D in the Act of 1853 was concerned with "any profits or gains arising to any person whatever from any profession, trade or vocation exercised in the United Kingdom." The above view, namely that no part of the premium income received under participating policies was liable to be assessed to income-tax was held by Lords WATSON, BRAMWELL, HERSCHELL and MACNAGHTEN. Lord HALSBURY and Lord FITZGERALD dissented from that view and were of opinion that the surplus returned or credited to members was liable to

(1) (1889) 14 App. Cas., 381.

income-tax. Lord HALSBURY at the beginning of his address at page 389 stated: "I think the appellants do carry on a concern. . . which brings in profit." Lord FITZGERALD at page 404 stated: "My Lords, we are now dealing with this case not as between the corporation and the individual policy-holders who may happen to be members in respect of their policies, but as between the Crown in respect of a public general tax and the corporation as a trading concern, which it is indubitably." The majority, however, were of the opinion that the association was not a profit-making concern such as would attract income-tax.

In the case of the *United Service Club, Simla v. The Crown* (1) a learned single Judge of the Lahore High Court, relying on the case of *New York Life Insurance Company v. Styles* (2), held that the income of the United Service Club at Simla, a company registered under the Indian Companies Act, was not liable to be assessed to income-tax under the Indian Income-tax Act (Act VII of 1918) except in respect to its house property. At page 110 the learned Judge observes: "The money received by the Club from its members does not fall within class (iv), 'income derived from business', as the Club does not trade with its members, but the object for which it exists is their mutual benefit. If the money which the Club receives from its members were chargeable to income-tax, it could only be so chargeable under class (vi) as 'income derived from other sources'. The question for determination is whether such money can be regarded as 'income' at all." He goes on to find that it is not income from other sources within the meaning of the Act. At page 113 he observes: "and I do not think that the money received by a club from the members composing it can be properly regarded as 'income', a word which itself seems to imply something received from outside." It will be observed that Act VII of 1918 was then in force and in that Act the words "profits or

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(1) (1921) I.L.R., 2 Lah., 109.

(2) (1889) 14 App. Cas., 381.

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gains", which find place in section 4(1) of Act XI of 1922, did not occur; but in *Commissioner of Income-tax v. Shaw Wallace & Company* (1) their Lordships of the Privy Council held that the expansion of the language into "income, profits and gains" was more a matter of words than of substance.

In *Commissioner of Income-tax v. Millowners Mutual Insurance Association* (2) a Bench of the Bombay High Court held that in the case of a mutual insurance company limited by guarantee, and formed by its members for the mutual insurance of members against liability to pay compensation to workmen employed by them and their dependents for accidents, etc., the surplus of the calls or premiums and further sums received by the company from its members over its expenditure of the year was not liable to be assessed to income-tax as profits or gains of business under sections 6(iv) and 10 or any other section of the Indian Income-tax Act, XI of 1922. There too the case of *New York Life Insurance Company v. Styles* (3) was relied upon. The learned Judges in discussing that case observed that the general principle therein laid down was that "if a body of persons choose to contribute a sum of money for their own purposes, any surplus of that sum remaining after expenses have been paid cannot be regarded as profit".

In *Board of Revenue v. Mylapore Hindu Permanent Fund* (4) the capital of a mutual benefit society was made up solely of periodical investments by its members and the income of the society was mainly derived from interest earned on loans given solely to its members, every one of whom was by the rules eligible to take loans; and it was held by a Special Bench of the Madras High Court that such interest earned by the society from its own members was not taxable "profits" within section 9 of the Indian Income-tax Act (Act VII of 1918) in spite of the fact that the society was registered under the

(1) (1932) I.L.R., 59 Cal., 1343.  
(2) (1889) 14 App. Cas., 381.

(3) (1931) I.L.R., 56 Bom., 119.  
(4) (1923) I.L.R., 47 Mad., 1.

Indian Companies Act. In considering the case of *New York Life Insurance Company v. Styles* (1) the learned Judges observed: "The principle of that case is that income to be taxable must come in from outside and not from within." The question does not seem to have been considered whether a mutual concern can trade with its members and whether the payment and receipt of interest on loans advanced might not amount to a money-lending business between the association and its members.

Learned counsel for the department on the other hand strongly relies on the English case of *Liverpool Corn Trade Association v. Monks* (2). In that case an association had been formed for promoting the interests of the corn trade and the objects of the association, as set out in the memorandum of association, were *inter alia* as follows:

(1) To promote or oppose legislative and other measures calculated to affect the corn trade generally, and for those purposes to petition Parliament and take such other steps and proceedings as may be expedient, and to define, make and maintain uniformity and expediency in the rules, regulations, usages and customs of the said trade, and to establish just and equitable principles therein.

(2) To adjust and settle disputes between persons engaged in the said trade by establishing a tribunal of reference for the amicable adjustments of such disputes.

(3) To provide, regulate and maintain a suitable building, exchange, market and room for the purposes of the corn trade in Liverpool.

(4) To establish and maintain a clearing house for the clearance of contracts or periodical settlement of contracts, and for facilitating payments between persons engaged in the corn trade.

In order that the facts of that case may be understood I quote the following observation from the begin-

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(1) (1889) 14 App. Cas., 381.

(2) [1926] 2 K.B., 110.

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ning of the judgment, which was delivered by ROWLATT, J:

"In this case there was a company with a share capital of £60,000 in 400 shares of the unusually large denomination of £150 each, and its object was to maintain, and it did maintain, buildings for the purposes of the corn trade in Liverpool, and afford a number of facilities in those buildings. It made charges to its members and to other people proportionate to the use they made of the facilities; and it could, and at one time it did, declare a dividend upon its share capital. The major part of the clientele of the company, or at any rate the more important part, were, I have no doubt, the members themselves, and I suppose the members joined in order that, as members, they might have the benefit of the facilities upon more reasonable terms than outsiders. They paid an entrance fee when they became members. There is nothing more to be said, I think, about the company, except perhaps this, that a member had to become a shareholder, but that he could not hold more than two shares, and if he had more than one, the extra one might be requisitioned in order to enable a new entrant to obtain his share if he could not acquire a share otherwise.

"The question here is whether the profit which the company makes out of what the members pay to it is taxable income of the business which the company undoubtedly carries on. That alleged profit consists of the amount by which the entrance fees of the members and their subscriptions for the various facilities exceed the cost of keeping up the buildings and affording the facilities. I do not see why that amount is not a profit. The company has a capital upon which dividends may be earned, and the company has assets which can be used for the purpose of obtaining payments from its members for the advantages of such use, and one is tempted to ask why a profit is not so made exactly on the same footing as a profit is made by a railway company who issues a travelling ticket at a price to one of its own shareholders, or at any rate as much a profit as a profit made by a company from a dealing with its own shareholders in a line of business which is restricted to the shareholders. If there were a railway company which only carried its own shareholders, one would say that when it afforded the advantage to a shareholder of performing an act of transit for him, being paid by the shareholder therefor, that the profit thereby made was a profit of the company just as much as if the shareholder was a stranger."

That case is of course distinguishable from the case of *New York Life Insurance Company v. Styles* (1) and from the case with which we are now dealing by the fact that there was a share capital and that there were shareholders who had a right to demand dividends, if declared. At the same time it is to be observed that notice was taken of the fact that the company dealt with persons who happened to be the owners of the share capital "affording benefits to those persons individually for which they pay money by way of subscriptions and by way of entrance fees" and the learned Judge accepted the Attorney-General's contention that there was no reason at all for regarding otherwise than as profits the difference which was obtained by dealings between the corporation and the persons who happened to be its members.

It is I think settled—and in fact it is not disputed—that in certain cases at least money paid in by members of a "mutual concern" is exempt from income-tax; and the fact that the Chamber of Commerce at Hapur is in one aspect at least a mutual concern seems to have been recognized by the Income-tax authorities, inasmuch as they have conceded that the admission fees and subscriptions are contributions by members such as did not attract income-tax. At the same time learned counsel for the assessee concedes that a "mutual concern" may trade with its members and that in such circumstances the profits earned thereby will be liable to tax. The Income-tax Commissioner, however, has clearly conceded in his statement of the case that the income from commission and registration fees is not income from "business" within the meaning of section 6(*iv*) of the Act; but he is of opinion that it is taxable on the ground that it is "payments made by members for services rendered to them by the assessee". I refrain from expressing any view as to whether the Income-tax Commissioner was right in conceding that these payments are not income

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(1) (1889) 14 App. Cas., 581.



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from business, for I am clearly of opinion that the department is bound by that admission. This Court is only called upon to answer the questions of law which have been formulated by the Income-tax Commissioner in his statement of the case. It is true that the Income-tax Officer and the Assistant Commissioner of Income-tax both held that these payments were income from "business" and on that account the assessee asked the Income-tax Commissioner to refer this question to the High Court; but I do not think that this Court can resurrect a question which has been answered by the Commissioner himself in favour of the assessee. Now if these payments are not income from business, it is difficult to see from what "other source" a mutual concern can derive profits. Since it has been held by the Income-tax authorities that these payments are not income from business, I find myself unable to differentiate between them and the admission fees and subscriptions which have been held to be contributions other than "income" and therefore not taxable.

As regards payments which are made by outsiders through members, learned counsel for the assessee argues that there is no privity between the company and the outsiders and that these payments must therefore be deemed to be payments made by members in the same way as those which are made by members on their own behalf. We are not impressed by this argument. That the Association has direct dealings with outsiders is shown in paragraph 5 of the objects of the Association as set forth in the memorandum and also by rule 7 of Appendix B as reproduced on page 15 of the paper book. At the same time it seems to me that such payments cannot appropriately fall under any head other than "business"; and since it has been conceded—whether rightly or wrongly—by the Income-tax Commissioner that they are not income from "business" I must hold that they are not taxable as income from "other sources" within the meaning of section 4(vi) of the Act. For

reasons already given I express no opinion as to whether they do in fact fall under the head of "business".

*Question No. 3*—Learned counsel for the assessee admits that clause (i) of sub-section (3) of section 4 of the Act has no application. There remains clause (ii) of that sub-section which provides that "Any income of a religious or charitable institution derived from voluntary contributions and applicable solely to religious or charitable purposes" is exempt from income-tax. "Charitable institution" is not defined, but "charitable purpose" is defined as including "relief of the poor, education, medical relief and the advancement of any other object of general public utility." Obviously the word "charitable" in the Act has a technical significance other than the meaning which it bears in common parlance. The ostensible object of this association is to provide facilities of trade and to improve business. As regards the question of "general public utility", it has been held in numerous cases that the requirements of the law will be satisfied if the benefit goes to a section of the community; *vide* for instance the English case of *In re Mellody* (1). In that case a testatrix bequeathed the income of a fund in trust to provide an annual treat or field day for the school children of a certain locality, or as many of such children as the same would provide for: and it was held that the bequest was a good charitable gift. At the same time every institution whose object is to benefit the public or a section of the public is not necessarily "charitable". In the Privy Council case of *Verge v. Somerville* (2) Lord WRENBURY in considering whether a valid charitable trust had been created made the following observation: "To ascertain whether a gift constitutes a valid charitable trust. . . a first inquiry must be whether it is public—whether it is for the benefit of the community or of an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of such inhabi-

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(1) [1918] 1 Ch., 228.

(2) [1924] A.C., 496.

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tants, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot."

In the present case the persons who are actually benefited are (1) those particular individuals who are members of the association and (2) such outside merchants as may elect, when doing business at Hapur, to do it through the Chamber of Commerce. I feel some doubt as to whether in the circumstances an object of general public utility as contemplated by the Act is being advanced by the assessee. Further, it seems to me that before an institution can be held to be "charitable" there must be an element of altruism; that is to say the beneficiaries must not be able to *claim* the benefit. That condition is wanting in the present case. Moreover, the contention of learned counsel for the assessee that there is no privity between the assessee and outsiders and that this is a "mutual concern" of the members who compose the association appears to me to be inconsistent with his claim that the assessee is a "charitable institution" within the meaning of clause (ii) of sub-section (3) of section 4 of the Act. The whole idea of a "mutual concern" is that the particular members composing it should be benefited.

Without considering whether the other requirements of clause (ii) are or are not satisfied, I am of opinion that for the reasons given above the assessee is not a "charitable institution" within the meaning of the Act and is not as such exempt from tax.

*Question No. 5*—Learned counsel for the assessee concedes that apart from other considerations the assessee cannot claim exemption *quoad* any money it may have elected to spend on charity.

BAJPAI, J.: I agree.

BY THE COURT:—Our reply to the reference is as follows:

*Question No. 1*—This question is answered in the affirmative.

*Question No. 2*—The answer to this question is that such payments are not income from any sources other than business. We express no opinion as to whether the Income-tax Commissioner's admission that they are not income from business is or is not correct.

*Question No. 3*—The answer to this question is in the negative.

*Question No. 5*—The answer to this question is in the affirmative.

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### APPELLATE CIVIL

*Before Mr. Justice Harries and Mr. Justice Ganga Nath*  
BANARSI DAS AND ANOTHER (PLAINTIFFS) v. SUMAT PRASAD  
AND OTHERS (DEFENDANTS)\*

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April, 6

*Hindu law—Adoption—Jains—Custom—Jain widow can adopt to her husband without anybody's permission or consent—Extent of estate taken by such adopted son—Agreement that adoptive mother is to remain in possession during her life—Validity—Widow's motive for adoption immaterial where she has an unfettered right to adopt—Proof of a custom well recognized by courts—Judicial notice.*

According to a well established and recognized custom among the Jains, a widow can adopt without authority from her husband or permission of his kinsmen. This right of the widow is quite independent of the nature and extent of the rights acquired by her in her husband's estate, and the son adopted by her succeeds to all the property, ancestral as well as self-acquired, of her deceased husband.

A deed of agreement under which the adoptive mother was to remain in possession of the property during her life time was valid and did not affect the validity of the adoption. Custom had sanctioned such arrangements postponing the interest of the adopted son to the widow's interest, even though it should be one extending to a life interest in the whole property.

Where the widow has in herself an unfettered power to adopt without any person's permission, an inquiry into her motives for making an adoption would be purely irrelevant.

\*First Appeal No. 220 of 1931, from a decree of Nand Lal Singh, Additional Subordinate Judge of Saharanpur, dated the 30th of March, 1931.

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A custom that has been repeatedly brought to the notice of the courts and has been recognized by them regularly in a series of cases attains the force of law and it is no longer necessary to assert and prove it by calling evidence.

Dr. S. N. Sen and Messrs. P. L. Banerji, S. K. Dar and S. N. Seth, for the appellants.

Dr. K. N. Katju and Mr. Shiva Prasad Sinha, for the respondents.

HARRIES and GANGA NATH, JJ.:—This is a plaintiffs' appeal and arises out of a suit brought by them against the defendants respondents for a declaration that Sumat Prasad, defendant No. 1, is not the lawfully adopted son of Lala Badri Das and of his widow Mst. Kampa Devi, defendant No. 2, and that he has no title to their estate described in the plaint, and that all declarations made in the deeds dated the 20th January, 1929, do not affect the reversionary rights of the plaintiffs in the estate of Lala Badri Das.

\* \* \* \* \*

[The parties were Agarwal Jains, and the main question of law was whether the adoption made by the widow was valid and the adopted son succeeded to the ancestral estate of her deceased husband.]

The chief ground on which the validity of the adoption has been attacked is that it was made by defendant No. 2 without the authority of her husband. Among the Hindus the objects of adoption are two-fold. The first is religious—to secure spiritual benefit to the adopter and his ancestors by having a son for the purpose of offering funeral cakes and libations of water, and the second is secular—to secure an heir and perpetuate the adopter's name. The Jains do not believe in the spiritual efficacy of adoption. They do not perform *shradhs* to the dead, which is at the base of the religious theory of adoption, nor do they believe in the Hindu doctrine of the spiritual efficacy of a son. Adoptions among them want the spiritual element and are entirely secular in character. They are governed by

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the Hindu law of adoption, except in certain particulars in which it has been proved that their usages are different. According to the defendants, by a custom prevailing among the Jains a Jain widow is competent to adopt without authority from her husband or permission of his kinsmen. As the adoption is a temporal institution among them, an only son or daughter or sister's son and a married man can also be adopted and no religious ceremony is necessary for adoption. In this case the only point which has to be considered is whether a Jain widow can adopt without authority from her husband or permission of his kinsmen. The custom under which she can do so has been recognized in a series of cases since 1833. The earliest case is that of *Maharaja Govindnath Ray v. Gulal Chand* (1), in which the competency of a widow to adopt without the sanction of her husband was recognized. The tradition on which this custom was based has been described at length on pages 280 and 281 of the report.

In 1878 in *Sheo Singh Rai v. Dakho* (2), the custom was affirmed by their Lordships of the Privy Council. They held: "According to the usage prevailing in Delhi and other towns in the N. W. P. among the sect of the Jains known as Saraogi Agarwals, a sonless widow takes an absolute interest in the self-acquired property of her husband; has a right to adopt without permission from her husband or consent of his kinsmen; and may adopt a daughter's son, who, on the adoption, takes the place of a son begotten."

In 1886 this Court, in accordance with the case of *Sheo Singh Rai v. Dakho* (2), referred to above, held in *Lakshmi Chand v. Gatto Bai* (3): "The powers of a Jain widow, except that she can make an adoption without the permission of her husband or the consent of his heirs, and may adopt a daughter's son and that no ceremonies are necessary, are controlled by the Hindu law of adoption."

(1) (1833) 5 S.D.A. (Cal.), 276. (2) (1878) I.L.R., 1 All., 688.  
(3) (1886) I.L.R., 8 All., 319.

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In 1907 in *Manohar Lal v. Banarsi Das* (1), this Court held that according to the law and custom prevailing amongst the Jain community a widow has power to adopt a son to her deceased husband without special authority to that effect, and a married man may lawfully be adopted.

In *Asharfi Kunwar v. Rup Chand* (2) this Court again held that according to the law and custom prevailing amongst the Jain community a widow has power to adopt a son to her deceased husband without any special authority to that effect. This decision was affirmed by their Lordships of the Privy Council in *Rup Chand v. Jambu Prasad* (3).

In *Jiwraj v. Mst. Sheokuwarbai* (4) the court of Nagpur Judicial Commissioners held that the permission of the husband was not necessary in the case of a Jain widow adopting a son. This decision was affirmed by their Lordships of the Privy Council in *Sheokuwarbai v. Jeoraj* (5). Their Lordships held: "Among the Sitambari Jains the widow of a sonless Jain can legally adopt to him a son without any express or implied authority from her deceased husband to make an adoption, and the adopted son may at the time of his adoption be a grown up and married man. The only ceremony to the validity of such an adoption is the giving and taking of the adopted son."

In a very recent case, First Appeal No. 51 of 1935, which was decided in this Court on the 10th April, 1935, adoption by a Jain widow without permission has been recognized.

In 1889 the Calcutta High Court held in *Manik Chand v. Jagat Settani* (6): "A widow of the Oswal Jain sect can adopt a son without the express or implied authority of the husband."

(1) (1907) I.L.R., 29 All., 495.

(3) (1910) I.L.R., 32 All., 247.

(5) (1920) 61 Indian Cases, 481.

(2) (1908) I.L.R., 30 All., 197.

(4) (1917) 56 Indian Cases, 65.

(6) (1889) I.L.R., 17 Cal., 518.



In 1899 the same High Court again, in *Harnabh Pershad v. Mandil Dass* (1), held that "Upon the evidence in the case, consisting partly of judicial decisions and partly of oral testimony, the custom that a sonless Jain widow was competent to adopt a son to her husband without his permission or the consent of his kinsmen was sufficiently established and that in this respect there was no material difference in the custom of the Agarwal, Chorewal, Khandwal and Oswal sects of the Jains, and there was nothing to differentiate the Jains at Arrah from the Jains elsewhere."

In the Punjab also the same custom has been recognized. In *Sundar Lal v. Baldeo Singh* (2) it was held: "It is well settled that Jains of Delhi in particular and Northern India in general are governed by the Hindu law of the Mitakshara school, except in so far as it may be proved to have been modified in any material particular by a well established custom. Among the Jains of Delhi the Hindu law has been varied to this extent that in the matter of adopting a son to her deceased husband a widow need not possess express or implied authority from him, nor is the consent of the kinsmen necessary for the purpose. A son validly adopted by a widow to her predeceased husband is under Hindu law like a son begotten on her by him and succeeds not only to the self-acquired or separate property of the adoptive father, but takes also the latter's coparcenary interest in the joint Hindu family of which he was a member at the time of his death, and the usage of the Jains relating to this matter is in accord with Hindu law."

It has been argued on behalf of the appellants that the judicial decisions might be regarded as recognizing a custom of the right of a Jain widow to adopt a son to her husband without her husband's authority or the permission of his kinsmen only when she succeeds to the self-acquired property of her deceased husband. The

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(1) (1899) I.L.R., 27 Cal., 379.

(2) (1932) I.L.R., 14 Lah., 78.



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argument is based on the following observations of their Lordships of the Privy Council in *Sheo Singh Rai's* case (1):

"These findings are thus stated in the judgment, and their Lordships entirely concur in them:

"Contrasting this evidence with that given by the independent witnesses examined under the several commissions and having regard to the position which several of the Delhi witnesses hold as expounders of the law of the sect, it cannot be doubted that the weight of evidence greatly preponderates in favour of the respondents. It appears to us that, so far as usage in this country ordinarily admits of proof, it has been established that a sonless widow of a Saraogi Agarwala takes by the custom of the sect a very much larger dominion over the estate of her husband than is conceded by Hindu law to the widows of orthodox Hindus; that she takes an absolute interest at least in the self-acquired property of her husband (and as we have said, it is not necessary for us to go further in this suit, for the property in suit was purchased by the widow out of self-acquired property of her husband); that she enjoys the right of adoption without the permission of her husband or the consent of his heirs; that a daughter's son may be adopted, and on adoption takes the place of a begotten son. It also appears proved by the more reliable evidence that on adoption the estate taken by the widow passes to the son as proprietor, she retaining a right to the guardianship of the adopted son and the management of the property during his minority, and also a right to receive during her life maintenance proportionate to the extent of the property and the social position of the family."

The argument is that the sentences, "That she takes an absolute interest at least in the self-acquired property of her husband (and as we have said, it is not necessary for us to go further in this suit, for the property in suit was purchased by the widow out of self-acquired property of her husband)" and "That she enjoys a right of adoption without the permission of her husband or the consent of his heirs", should be read together. On examination of the report of the judgment against which

(1) (1878) I.L.R., 1 All., 688 (704).

the appeal was preferred, in *Sheo Singh Rai v. Mst. Dakho* (1), it will be found that these two sentences record two separate customs and are not dependent on each other and cannot be read together as connected with each other. The observations made on page 383 of the report will clearly show that each point was in reply to each of the separate questions framed by the High Court. In order to explain this it is necessary to refer to the points in issue which were inquired into in the case. The issues which were framed by the court would appear from the following passage on page 385 :

"The Jains have no written law of inheritance. Their law on the subject can be ascertained only by investigating the customs which prevail among them, and for the ascertainment of those customs we think the court below would exercise a wise discretion if it issued commissions for the examination of the leading members of the Jain community, in the places in which they are said to be numerous and respectable, namely Delhi, Muttra and Benares. The questions to be addressed to those gentlemen would be the following:

'What interest does the widow take under Jain law in the movable and immovable property of her deceased husband, and does her interest differ in respect of the self-acquired property and the ancestral property of her husband?'— 'Is a widow under Jain law entitled to adopt a son without having received authority from her husband and without the consent of her husband's brother?'— 'May a widow adopt the son of her daughter?'— 'By the adoption of a son, does the adopted son succeed as the heir of the widow or as the heir of her deceased husband?'— 'Has the adoption of a son by a widow any effect, and if any, what effect, in limiting the interest which she takes in her husband's estate?'"

So there is no foundation for the argument that the custom recognized in *Sheo Singh Rai v. Dakho* (2) was in any way dependent on the nature of the property which the widow acquired in the estate of her deceased husband. The right of the widow to adopt without the permission of the husband and consent of his kinsmen was recognized quite independently of the

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(1) (1874) 6 N.W.P. H.C.R., 382. (2) (1878) I.L.R., 1 All., 688.

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nature and extent of the widow's rights acquired by her in the estate of her deceased husband. The second question relating to the widow's power to adopt has no reference to the property and is quite general.

Not a single case has been cited on behalf of the appellants in which the widow's right to adopt without the authority of her husband or permission of his kinsmen was ever disputed or denied or not recognized in any case where the husband was possessed of ancestral property to which the widow succeeded on his death.

On the other hand, there are several cases in which even in the case of ancestral property this right of the widow was established and recognized. In the earliest case of 1833, *Maharaja Govindnath Ray v. Gulal Chand* (1), of the Sudder Dewani Adawlat, Calcutta, the property in dispute was ancestral. In both the Calcutta cases, *Manik Chand v. Jagat Settani* (2) and *Harnabh Pershad v. Mandil Dass* (3), also, the properties in dispute were ancestral.

An adoption made by a widow without the authority of her husband was recognized in the family of the parties themselves. A suit was brought in 1903 by Manohar Lal, son of Kedar Nath, brother of Banarsi Das, plaintiff No. 1, and Badri Das for partition of the family property . . . Ganeshi Lal's widow, Mst. Kishen Dei, had adopted Banarsi Das's son Mulchand. Mulchand's adoption was disputed by Manohar Lal. On behalf of the defendants Mulchand's adoption was set up. . . . The learned Subordinate Judge held that Mulchand had been adopted by Mst. Kishan Dei without her husband's permission. The learned Subordinate Judge held that the plaintiff's share was 1/5th. Being dissatisfied with this judgment, Manohar Lal appealed to the High Court where the validity of Mulchand's adoption was contested merely on the ground that the adoption of a married man was not valid under

(1) (1833) 5 S.D.A. (Cal.), 276.

(2) (1889) I.L.R., 17 Cal., 518.

(3) (1899) I.L.R., 27 Cal., 379.

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the law and custom prevailing amongst the Jain community. If there had been no custom entitling a widow to adopt a son to her husband without the husband's authority or permission of his kinsmen, the validity of the adoption must have been contested on the ground of want of permission, especially when the learned Subordinate Judge had held that the adoption had been made by the widow without the permission of her husband. The decision of the High Court is reported in *Manohar Lal v. Banarsi Das* (1), referred to above.

Adoption and succession are two distinct matters, and so are the rules which govern them. An adoption may be made even when there may be no question of any succession. There is no reason for making any distinction in the custom in cases where the widow succeeds to the self-acquired property and the ancestral property of her husband. The nature of the property, i.e. whether it is self-acquired or ancestral, would affect the rights which the widow would acquire in it, but not the widow's right of adoption. The adopted son does not succeed to the property through the widow, but succeeds through the adoptive father, having the same status as that of a natural born son begotten by the husband on his adopting widow. An adoption would be either valid or invalid, but it cannot be partly valid and partly invalid. It has been argued on behalf of the appellants that where a widow possesses both self-acquired and ancestral property of her husband, the widow might adopt without authority of her husband, but the adoption would be valid only in respect of the self-acquired property of the husband. This argument is wholly untenable because the adoption is not made with regard to property. The adoption confers on the adopted son all the rights of a natural born son begotten on the adopting widow by her deceased husband, and he succeeds to all the property, ancestral as well as self-acquired, of his adoptive father.

(1) (1907) I.L.R., 29 All., 495.

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The question of the rights of the adopted son was considered in *Sheo Singh Rai v. Dakho* (1). One of the questions referred for inquiry by the High Court was: "By the adoption of her son, does the adopted son succeed as the heir of the widow or as the heir of her deceased husband?" The finding of the High Court on this point, which was confirmed by their Lordships of the Privy Council was, "That a daughter's son may be adopted and on adoption takes the place of a begotten son." (vide page 704).

The same point was considered in *Harnabh Pershad v. Mandil Dass* (2), where it was observed: "Whether she took an absolute or qualified estate, the evidence is uniform that the adopted son acquires the same right to the property as her husband had, although there is some slight difference of opinion as to the extent of the control which she may retain over it." In *Kapur Chand v. Narinjan Lal* (3), the Punjab Chief Court also considered the rights of a son adopted by a Jain widow. It was held: "A valid adoption by a widow to her husband has the effect of placing the adopted son in the position which he would have occupied had he been adopted by that husband or been a posthumous child of that husband, and that the adopted son must be received into the joint family partnership on adoption, and is entitled to all the rights of an ordinary member of that partnership, which has continued to exist in spite of the death of the deceased partner. . . . The adoption was valid and had the effect of vesting in the adopted son the share of the deceased in the joint family property of every description."

The Lahore High Court again held in *Sundar Lal v. Baldeo Singh* (4), referred to above: "A son validly adopted by a widow to her predeceased husband is under Hindu law like a son begotten on her by him and succeeds not only to the self-acquired property of the

(1) (1878) I.L.R., 1 All., 688.

(3) Punj. Rec. 1897, p. 74.

(2) (1899) I.L.R., 27 Cal., 279(393).

(4) (1932) I.L.R., 14 Lah., 78.

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adoptive father, but takes also the latter's coparcenary interest in the joint Hindu family of which he was a member at the time of his death." As already stated, Jains are governed by Hindu law of adoption, except in the matters of (1) authority for adoption, (2) restrictions as to the adoptee's qualifications and (3) religious ceremonies; see *Lakhmi Chand v. Gatto Bai* (1), referred to above. Among them there is no restriction as to the adoption of an only son or a daughter's son or sister's son or a married man and no religious ceremonies are necessary. In all other matters the Hindu law of adoption applies to them. Under the Hindu law the adopted son becomes for all purposes the son of his father and his rights unless curtailed by express texts are in every respect the same as those of a natural born son. The only express text by which the heritable rights of an adopted son are "contracted" refers to the case of his sharing the heritage with an after-born natural (*aurasa*) son. Rajkumar Sarvadhikari states in his lectures on Hindu law at page 557: "In every other instance the adopted son and the son of the body stand exactly on the same position." An adopted son is the continuator of his adoptive father's line exactly as an *aurasa* son, and an adoption, so far as the continuity of the line is concerned, has a retrospective effect; whenever the adoption may be made there is no hiatus in the continuity of the line; see *Pratapsingh Shiusingh v. Agarsingji Rajasangji* (2). There is no authority for the proposition that a son adopted by a Jain widow has restricted rights of inheritance. On the other hand, the cases cited above would show that he has the same rights as a natural born son has.

The right of the widow to make an adoption does not depend on the nature and character of the estate to which she succeeds from her husband. In *Pratapsingh Shiusingh v. Agarsingji Rajasangji* (2), at page 793 their Lordships of the Privy Council observed: "The

(1) (1886) I.L.R., 8 All., 319.

(2) (1918) I.L.R., 43 Bom., 778(792).

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right of the widow to make an adoption is not dependent on her inheriting, as a Hindu female owner, her husband's estate. She can exercise the power, so long as it is not exhausted or extinguished, even though the property was not vested in her."

In *Harnabh Pershad v. Mandil Dass* (1), referred to above, at page 393 it was observed: "There is in the evidence no reason for drawing any distinction between ancestral and self-acquired property, and we see no ground for distinction. We do not, however, consider that the two customs must stand or fall together. They seem to us quite independent. The custom by which the widow can adopt without her husband's permission does not in any way depend upon the nature of the estate which she takes from her husband. Whether she took an absolute or qualified estate, the evidence is uniform that the adopted son acquires the same right to the property as her husband had, although there is some slight difference of opinion as to the extent of the control which she may retain over it."

It may also be observed here that defendant No. 2, the widow, has succeeded to both ancestral and self-acquired property of her husband.

[Certain facts were then referred to as establishing this.]

The next point that arises for consideration is whether in the absence of oral evidence it can be held in this case on the basis of the judicial decisions referred to above that the custom exists. A custom that has been repeatedly brought to the notice of the courts and has been recognized by them regularly in a series of cases attains the force of law and it is no longer necessary to assert and prove it. In *Jadu Lal Sahu v. Janki Koer* (2) the question was whether the plaintiffs who were Hindus were entitled to a right of pre-emption under Muhammadan law, under a custom prevailing in Bihar. This custom had been recognized in

(1) (1899) I.L.R., 27 Cal., 379.

(2) (1912) I.L.R., 39 Cal., 915.



*Fakir Rawot v. Sheikh Emambakhsh* (1). Their Lordships of the Privy Council observed in *Jadu Lal Sahu v. Janki Koer* (2) at page 922: "In the case of *Fakir Rawot v. Emambakhsh* a Full Bench of the High Court of Bengal gave judicial recognition to the existence of the right of pre-emption among the Hindus of Bihar. . . . In their Lordships' judgment the decision in *Fakir Rawot's* case is conclusive on the point raised on behalf of the defendants."

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In *Rama Rao v. Rajah of Pittapur* (3), at page 785 their Lordships of the Privy Council observed: "No attempt has been, as already stated, made by the plaintiff to prove any special custom in this zamindari. That by itself in the case of some claims would not be fatal. When a custom or usage, whether in regard to a tenure or a contract or a family right is repeatedly brought to the notice of the courts of a country, the courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case."

As will appear from the cases referred to above, the custom under which a Jain widow can adopt a son to her husband without her husband's authority or permission of his kinsmen has been recognized by judicial decisions since 1833 in different parts of the country, that is Bengal, Central Provinces, United Provinces and the Punjab. In our opinion these decisions are sufficient to hold in this case the existence of the custom, and it is no longer necessary to prove it in each case by oral evidence.

The validity of the adoption has also been contested, though not seriously, on the ground of the execution of the deed of agreement under which defendant No. 2 is to remain in possession of the property during her life time. The agreement is valid and does not affect the validity of the adoption. At one time it was questionable whether the natural guardian of the adopted son could enter into any agreement with the adopting

(1) (1863) B.L.R. (Sup. Vol.), 35. (2) (1912) I.L.R., 39 Cal., 915.

(3) (1918) I.L.R., 41 Mad., 778.



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widow so as to bind the adopted son. The matter has been conclusively decided by their Lordships of the Privy Council in *Krishnamurthi Ayyar v. Krishnamurthi Ayyar* (1). Their Lordships observe at pages 263 and 264:

"It will be seen from these views that in their Lordships' opinion the only ground on which such arrangement can be sanctioned is custom. They are of opinion that there is such a consensus of decision in the cases, with the exception of the case of *Jagannadha v. Papamma* (2), that they are fairly entitled to come to the conclusion that custom has sanctioned such arrangements in so far as they regulate the right of the widow as against the adopted son. It seems part of the custom that one *sine qua non* of such an arrangement should be the consent of the natural father. But if this is looked at narrowly, it is only because it is a part of the custom that it is either here or there. This leads to the remark that there is a good deal of looseness in the discussions in the judgments as to reasonableness. Some look at it from the point of view if whether, in view of the adoption only being granted on condition of the arrangement, this is, in the circumstances, reasonable for the boy. It would seem that it might well be assumed that if a natural father consented to give his son in adoption he would only do it if it were reasonable, i.e., for the boy's benefit in the circumstances. Others look at it from the point of view whether the adoption will put the boy in a reasonable position, i.e., not subject him to the duties of a son to do worship for his adoptive father without giving him sufficient advantages to enable him to do so. But the consensus of judgments seems to solve these two questions in this way, namely, that the consent of the natural father shows that it is for the advantage of the boy, and that the mere postponement of his interest to the widow's interest, even though it should be one extending to a life interest in the whole property, is not incompatible with his position as a son. Their Lordships are, therefore, prepared to hold that custom sanctions such arrangements."

The appellants have not shown any corrupt or capricious motive on the part of the defendant No. 2 in making the adoption. The plea is based on the following passage in *Collector of Madura v. Moottoo Ramalinga Sathupathy* (3), on page 442: "All that can be

(1) (1927) 54 I.A., 248.

(2) (1892) I.L.R., 16 Mad., 400.

(3) (1868) 12 Moo.I.A., 397.

said is that there should be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive." What was meant by this passage has been explained by their Lordships in *Rajah Velanki Venkata Krishna Row v. Venkata Rama Lakshmi Narsayya* (1), at page 13:

"This being so, is there any ground for the application which the High Court has made of a particular passage in the judgment in the *Ramnad* case? The passage in question perhaps is not so clear as it might have been made. The Committee, however, was dealing with the nature of the authority of the kinsmen that was required. After dealing with the *vexata quaestio* which does not arise in this case, whether such an adoption can be made with the assent of one or more sapindas in the case of joint family property, they proceeded to consider what assent would be sufficient in the case of separate property; and after stating that the authority of a father-in-law would probably be sufficient, they said: 'It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is, that there should be such evidence', not, be it observed, of the widow's motives but 'of the assent of kinsmen, as suffices to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. In this case no issue raises the question that the consents were purchased and not *bona fide* attained.'

"Their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow, and that all which this Committee in the former case intended to lay down was that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband."

(1) (1876) 4 I.A., 1.

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These cases are not applicable to the case where no consent of kinsmen is required and no family council need be called or consulted. Whenever a widow has in herself full and free power to adopt without any person's permission, any inquiry into her motives must be irrelevant, for her action is that of a person who does what she has the right to do. The mere fact that the adoption puts an end to the expectations of the persons who would have succeeded to the property if no adoption had been made is not sufficient to constitute a corrupt or capricious motive, as this result is bound to arise in each case of an adoption. The fact that adoption has in fact been made has not been challenged. We agree with the learned Subordinate Judge and hold that the adoption in question is valid. There is no force in the appeal. It is therefore ordered that the appeal be dismissed with costs.

#### APPELLATE CIVIL

*Before Mr. Justice Young and Mr. Justice Niamat-ullah*

BHOLA UMAR (DEFENDANT) v. KAUSILLA AND ANOTHER  
(PLAINTIFFS)\*

1932  
December, 2

1933  
November, 16

*Hindu law—Remarriage of widows—Forfeiture of interest in first husband's estate—Custom of remarriage in a particular caste—No forfeiture where custom existed prior to Act XV of 1856—Proof of custom—Instances may be referable either to the Act or to ancient custom—Hindu 'Widows' Remarriage Act (XV of 1856), section 2.*

In order to escape the operation of section 2 of the Hindu Widows' Remarriage Act, 1856, by which the widow upon remarriage forfeits her interest in her first husband's estate, it must be established that in the community or caste to which she belonged there already existed an ancient custom of remarriage of widows prior to the passing of that Act, as distinguished from a practice which might have come into existence since the passing of that Act. Instances of remarriage of widows in any community after 1856 might well be referable to the

\*First Appeal No. 523 of 1928, from a decree of Chatur Behari Lal, First Additional Subordinate Judge of Jaunpur, dated the 13th of August, 1928.

provisions of that Act and would not necessarily be indicative of an ancient custom existing before the passing of that Act. It must be shown that the present practice is in pursuance of such an ancient custom and not one which has grown up under the Act.

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Messrs. *B. E. O'Connor* and *Ram Nama Prasad*, for the appellant.

*Dr. K. N. Katju*, Messrs. *P. L. Banerji*, *Rama Kant Malaviya*, *Kedar Nath Sinha* and *Lakshmi Saran*, for the respondents.

YOUNG and NIAMAT-ULLAH, JJ.:—This is a defendant's appeal and arises in the following circumstances. One Lachmi Narain, by caste Umar Banya, was the owner of a number of properties specified at the foot of the plaint. He died leaving a widow Mst. Kausilla, the plaintiff respondent, and his uncle Bhola Umar, the defendant appellant, who obtained mutation of names in respect of the entire property in dispute. Thereupon the plaintiff instituted the present suit for recovery of possession of her deceased husband's property on the ground that she was entitled to it under the Hindu law. The plaintiff's claim was resisted by the defendant on the allegation that she had remarried and, according to the custom of the caste, forfeited all rights in her deceased husband's estate. It should be mentioned at this stage that the plaintiff made no reference in her plaint to her remarriage—a fact which, on being alleged by the defendant, was admitted by her; but she maintained that her remarriage had not the effect of divesting her of the interest which she acquired in her deceased husband's property by the Hindu law of succession. A number of other issues were raised by the pleadings; but it is not necessary to make a mention of them in detail. One of the issues framed by the lower court was: "What is the effect of Kausilla's (plaintiff No. 1) marriage with Mahadev? Does she thereby lose her right of inheritance in her husband's property under law or under any custom?"

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A number of witnesses were examined on both sides on this issue, the defendant attempting to establish that a widow forfeits, on remarriage, all rights in her first husband's estate, and the plaintiff adducing evidence to the contrary. The learned Subordinate Judge, who had laid the onus of proving a custom of forfeiture on the defendant, held that he failed to discharge the onus. Accordingly he found that the plaintiff is entitled to succeed to the property left by her first husband. He also found in favour of the plaintiff on other material issues arising in the case, with the result that her suit was decreed. The defendant appealed to this Court.

The appeal came on for hearing before a Division Bench of this Court on the 13th of June, 1932. The learned advocate for the appellant referred to a series of rulings of this Court in which it was held that if a Hindu widow could contract a valid marriage after the death of her first husband in accordance with the custom of her caste such remarriage would not entail a forfeiture under section 2 of the Hindu Widows' Remarriage Act (Act XV of 1856), and to those of other High Courts which took a contrary view, viz., that section 2 of that Act which provides for forfeiture applies in any case. It was represented to the Bench that in view of the conflict of judicial opinions on an important question like this, reference should be made to a Full Bench for a decision. Accordingly the following question of law was referred to a Full Bench: "Does a Hindu widow, who remarries in accordance with a custom of her caste, forfeit thereby her rights in the estate of her first husband?"

It should be observed that it was assumed in the reference that the remarriage was in accordance with the custom of the caste to which the widow belonged. The Division Bench did not decide the question of custom, indeed, any other question of fact, because if the Full Bench took the view which had been taken by other High Courts the plaintiff would forfeit her

rights as an heir of her first husband even though by the custom of her caste, as distinguished from the statutory provision contained in Act XV of 1856, she could remarry. After a consideration of all the authorities bearing on the subject, the reply of the Full Bench was in the following terms; see *Bhola Umar v. Kausilla* (1): "In our opinion section 2 of Act XV of 1856 does not apply to the case of those widows who are entitled under the custom of their caste to remarry and are not bound to take advantage of the provisions of the Act. Accordingly there is no forfeiture under the Act of the Hindu widow's estate on remarriage in such a case. We are further of opinion that the proof of mere custom of remarriage would not be sufficient to involve forfeiture under the Hindu law, and that it would be necessary for the party claiming that the estate has been forfeited on account of remarriage to prove that there is a custom of such forfeiture in such a contingency."

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The case has now been laid before this Bench for disposal in the light of the pronouncement of the Full Bench on the important question of law which arose and which was referred to it. It will be seen from the reply given by the Full Bench that if a Hindu widow remarries in accordance with the custom of her caste, and not because such marriage has been declared to be valid by the Hindu Widows' Remarriage Act (Act XV of 1856), she does not forfeit her first husband's estate, unless it is established that in spite of the validity of the marriage a forfeiture does occur under a custom of the caste. We have, therefore, to determine two important questions of fact; first, whether Mst. Kausilla was entitled to remarry after the death of her husband under a custom prevailing in the community of Umar Banyas, and secondly, if the first question is answered in the affirmative, whether, as pleaded by the defendant, in spite of the remarriage being valid she forfeited the

(1) (1932) I.L.R., 55 All., 24(60).

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estate of her first husband under a custom prevailing in her caste.

The question whether Mst. Kausilla could remarry according to the custom of her caste was not properly raised, nor decided. As already stated, the plaintiff made no reference in her plaint to her second marriage after the death of Lachhmi Narain. The written statement made no mention of the non-existence of the custom allowing remarriage of a widow in that caste. It merely averred that a widow who remarries forfeits the estate of her first husband. When the case was in its initial stages, it was admitted on behalf of the defendant that the remarriage of a widow was permissible in the community to which the parties belonged. Now, in view of the provisions of the Hindu Widows' Remarriage Act (Act XV of 1856), remarriage of a widow is permissible in the entire Hindu community, but it affects the right of the widow in her first husband's property. The statement made on behalf of the defendant above referred to goes no farther than to admit that a widow's remarriage is valid. It is silent on the further question whether the validity arises from the provisions of the Hindu Widows' Remarriage Act (Act XV of 1856) or from an ancient custom prevailing in that community wholly apart from the Act.

The practice of widow remarriage after 1856 in this community or in any other section of the Hindus may well be referable to the provisions of the Hindu Widows' Remarriage Act and would not necessarily be indicative of an ancient custom existing before the passing of that Act. Unless, therefore, it is shown that the present practice is in pursuance of an ancient custom and not under the Act, the marriage of a widow cannot be held to be under the custom of the caste. The earliest case of this Court, which has been followed in all later cases, laid down that "A widow belonging to a caste in which there is



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not, and in 1856 was not, any obstacle, by law or custom, against the remarriage of widows, did not, by marrying again, forfeit her interest in the property left by her first husband, in consequence of the passing of Act XV of 1856." See *Har Saran Das v. Nandi* (1). It should be noted that the existence of the custom in 1856 has been stressed, in this case and in other cases, because the practice of Hindu widows remarrying after 1856 would not necessarily be in pursuance of a custom of the caste. Having regard to the pronouncement of the Full Bench, which has merely affirmed the view taken in the case quoted above, it is necessary to determine whether the validity of remarriage of a Hindu widow, where a question of forfeiture of the estate of her first husband is involved, arises from a pre-existing custom under which such remarriage is valid. The decision of the question whether forfeiture of her first husband's estate occurred by the operation of section 2 of Act XV of 1856 depends upon the answer to the question whether the marriage had the sanction of the custom of the caste as it was before that Act. If it had, then according to the Full Bench view section 2 does not apply and no forfeiture would occur on that ground. If it had not, then the marriage itself is valid in view of the provisions of Act XV of 1856. but forfeiture would occur under section 2 thereof.

In the case before us it is not admitted by the defendant that remarriage of widows belonging to the community of Umar Banyas is sanctioned by a custom which is ancient and has not come into existence since 1856. The plaintiff must establish the existence of such custom, if she is to escape the operation of section 2 of Act XV of 1856. It is possible for us to take the view that the plaintiff should have alleged and established such a custom; and she having omitted to do so, her suit should be dismissed. In view, however, of the imperfect pleadings which were laid before the lower

(1) (1889) I.L.R., 11 All. 390.



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court for which both parties were responsible, we are of opinion that an opportunity should be given to the plaintiff to establish the existence of the custom referred to. As already stated, if the plaintiff succeeds in establishing such a custom, the further question which has been raised by the defendant falls to be considered, namely whether one of the incidents of the custom of remarriage prevailing before 1856 is that a widow remarrying after the death of her first husband forfeits all rights in the estate of her first husband. Though the case went to trial on this issue, the evidence bearing on it is so meagre and vague that it is not desirable to base our decision on it. In ordinary circumstances we would not have ordered a retrial of this issue; but as an opportunity is being given to the plaintiff to establish the custom which she has to prove, it is more satisfactory that the defendant should also be allowed a fresh opportunity to establish the custom of forfeiture as alleged by him. Accordingly we remit the following issues, under order XLI, rule 25 of the Code of Civil Procedure, for trial by the lower court:

(1) Whether, according to ancient custom, a widow belonging to the community of Umar Banyas could contract a valid remarriage before the passing of the Hindu Widows' Remarriage Act (Act XV of 1856); and

(2) If the first issue is found in the affirmative, does such widow forfeit her right in the property of her first husband according to the custom prevailing in the said community before 1856?

The findings shall be returned in four months. Parties shall be at liberty to adduce evidence on both the above issues. On receipt of findings ten days shall be allowed for objections.

YOUNG and NIAMAT-ULLAH, JJ.:—By our order dated the 2nd of December, 1932, we remitted two issues to the lower court for findings before we could dispose of the appeal finally. The parties have filed a compromise in the court below, which sets out the

terms on which the parties have agreed to settle their differences. The compromise was duly verified before the learned Subordinate Judge. No objection has been taken to its validity by any of the parties concerned. Accordingly we pass a decree in terms of the compromise.

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### FULL BENCH

*Before Sir Shah Muhammad Sulaiman, Chief Justice,*

*Mr. Justice Bennet and Mr. Justice Bajpai*

RAJPALI KUNWAR (PLAINTIFF) v. SARJU RAI AND OTHERS  
(DEFENDANTS)\*

1936

April, 15

*Hindu Law of Inheritance (Amendment) Act (II of 1929).  
section 2—Applicability where the Hindu male died before  
passing of the Act—Sister's succession—Hindu law—Com-  
promise between a Hindu widow and next reversioner under  
which he takes a part of the property absolutely for himself  
and his heirs—Family settlement—Interpretation of statutes  
—Preamble.*

An agreement or compromise was entered into between a Hindu widow in possession of her husband's estate and three nearest reversioners who had brought a suit impugning a deed of gift executed by her; she was also claiming an absolute title under an alleged will. Under this agreement the donee gave up his rights under the deed of gift, and a part of the estate was put in immediate possession of the three reversioners as belonging to them and their heirs absolutely, and it was provided that the rest of the property would, after the widow's death, also belong to them absolutely:

*Held* that the agreement was not binding, either as a compromise or as a family arrangement, on the person who became entitled to succeed, as the actual next reversioner, on the death of the widow. If the two parties, namely the widow on the one side and the collaterals on the other, had both been claiming title to the estate and a right to immediate possession, it could then have been said that there was a *bona fide* dispute between the parties which could be settled under a family arrangement. As the reversioners were merely challenging the validity of the deed of gift and not claiming any imme-

\*First Appeal No. 432 of 1931, from a decree of C. Deb Banerji, Subordinate Judge of Azamgarh, dated the 19th of June, 1931.

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diate title in themselves, they could not by means of the agreement partition the property and acquire an absolute interest for themselves and their own heirs to the exclusion of the actual reversioner who might be entitled to succeed on the death of the widow. In this transaction these collaterals were not representing the entire body of reversioners—indeed they were acting adversely to the interest of the actual reversioner—, nor did the actual reversioner derive title from them; the agreement, therefore, could not be binding on him.

*Held*, also, that where the succession opened out after the coming into force of the Hindu Law of Inheritance (Amendment) Act of 1929 a sister could take advantage of the provisions of the Act and claim inheritance although the last male owner had died previous to the coming into operation of that Act. Such a case is not one of giving “retrospective effect” to the Act. So, where the Act came into force between the death of a Hindu male and that of his widow who succeeded him, his sister is entitled, in the absence of any nearer heir, to succeed on the widow's death.

The preamble to an Act can no doubt be looked at where the section is ambiguous, and it supplies a key to the mind of the legislature and indicates what its intention was; but where the language of the section is clear, the preamble cannot control its provisions.

Messrs. *Shiva Prasad Sinha* and *R. K. S. Toshniwal*, for the appellant.

Messrs. *Gadadhar Prasad* and *Shambhu Prasad*, for the respondents.

SULAIMAN, C.J.:—The following questions have been referred to us for answer:

(1) Is the agreement dated the 20th of December, 1927, a family settlement?

(2) Is the plaintiff entitled to question the said agreement?

The present suit was filed by the plaintiff for a declaration that an agreement dated the 20th of December, 1927, was null and void against her. She is the sister of Sheo Shobhit Rai, who died about 1926 and on whose death the said agreement was entered into between his widows Mst. Jota Kunwar and Mst. Rumali Kunwar, his step-mother Mst. Rajwanta, another sister's

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son Narsingh, and Kashi Rai, Sarju Rai and Bhagwant Rai, three nearest reversioners at the time. A deed of gift had been executed in 1926 by the senior widow Mst. Jota and the step-mother Mst. Rajwanta in favour of Narsingh, who is alleged by the defendants to have been a sister's son; but that fact was not admitted in the written statement in this case. We know very little about the exact nature of the suit that was brought by Kashi Rai and others, but the recitals in the agreement show that the two ladies Jota and Rajwanta were setting up a will of the deceased Sheo Shobhit Rai in their favour and were claiming mutation of names on that account. The application for mutation of names was contested by the collaterals and some revenue cases were pending at the time. We also know that a suit was brought in the civil court by the three collaterals against the widows and the donee and it was pending at the time. The three collaterals were rather distant relations of Sheo Shobhit Rai, being the great-grandsons of Paltan Rai, who was the great-great-grandfather of Sheo Shobhit Rai. There is nothing on the record to show that the collaterals either brought a suit for possession or even alleged that they had been joint with the deceased and were entitled to immediate possession in preference to the two widows. All that happened might have been that they brought a suit for declaration that the deed of gift executed by the two ladies in favour of Narsingh was null and void and would not be binding on the reversioners after the death of the two widows. It was in the course of this litigation that the agreement in question was executed by all the parties who were then involved in litigation. The document was duly registered. The learned Subordinate Judge says that it was filed in court, but there is no direct evidence to prove even that fact.

The present plaintiff Mst. Rajpali Kunwar who is admittedly a sister of the deceased Sheo Shobhit Rai was, as the law then stood, not any heir at all to the

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estate of Sheo Shobhit Rai. She was altogether left out and was of course neither made a party to the agreement nor represented by any one on her behalf. Not being an heir at all she was altogether ignored. Indeed it was clearly recited in the agreement that excepting the collaterals there was no other heir of the deceased. Under this agreement the donee gave up his rights under the deed of gift and the step-mother Mst. Rajwanta claimed only a maintenance allowance without any interest in the estate. Properties in two villages were put in possession of the three collaterals as absolute owners from that very time and the rest of the property of Sheo Shobhit Rai remained in the possession of the two widows as Hindu widows, and it was provided that after their deaths the collaterals or their heirs would enter into possession and enjoyment of the said property as absolute owners. The document was described as a family settlement of the disputes among the parties.

The first question is whether this agreement is in the nature of a family settlement. The evidence on this point is extremely meagre and with the exception of the document itself there is hardly any other material which can throw any light on the circumstances under which this agreement was executed. It is not quite clear what was the exact nature of the dispute between the parties apart from the will which had been set up by the two ladies in their favour. For aught one knows the Hindu widows' estate was never disputed by the three collaterals and they never set up any paramount title of their own in preference to that of the Hindu widows. If this be the fact then it would be difficult to hold that the three collaterals had any *bona fide* dispute with the widows under which the whole estate could be partitioned there and then. The document merely indicates that there was some sort of a compromise between the widows, but all the circumstances

not being before us, it is impossible to say that this agreement was in the nature of a family settlement.

If the two parties, namely the Hindu widows on the one side, and the collaterals on the other, had both been claiming title to the estate and a right to immediate possession, it could then have been said that there was a *bona fide* dispute between the parties which could be settled under a family arrangement. But if the reversioners were merely challenging the validity of the deed of gift executed by the widows in favour of Narsingh and were not claiming any immediate title in themselves, they could not by means of the agreement partition the property and acquire an absolute interest for themselves and their own heirs to the exclusion of the real reversioners who might happen to succeed on the date of the death of the surviving widow when succession opened out. To allow the nearest reversioner to enter into a compromise with a Hindu widow and partition the property and take a part of it exclusively for himself and his own heirs and thereby exclude the reversioner who would become the ultimate heir would be dangerous and would open a wide door for fraud. In such a case it can hardly be said that the nearest collateral who takes a part of the property is representing the entire body of reversioners including that reversioner who would ultimately succeed to the estate on the death of the widow. Indeed he is acting adversely to the interest of such an heir in trying to take the property for himself exclusively.

The learned counsel for the respondents has not been able to cite before us a single case in which property taken by a nearest reversioner exclusively has been held to belong to him to the exclusion of the reversioner who ultimately succeeded to the estate on the death of the widow. The cases which have been cited before us are cases where either a decision against the widow and in favour of the nearest reversioner has been held to be binding on the widow and her own heirs, or cases in

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which a decision against the reversioner has been held to be binding against all other reversioners. Where the reversioners claim title on behalf of the entire body of reversioners, the suit becomes a representative suit and any decision or *bona fide* compromise arrived at would naturally be binding on all persons whom they represent. Similarly where a third party is claiming title to the estate and a suit is brought against the Hindu widow, who, in order to protect the estate, denies the title of the claimant, she is representing the future reversioners as well, and a decision fairly obtained may not only bind the widow but also all other reversioners who come after her. The case before us however is quite different, as here the reversioners attempted to partition the estate with the Hindu widows and retain a part of the property for themselves to the exclusion of the heirs who ought to succeed under the Hindu law. Such an agreement cannot be regarded as a family settlement so as to have a binding character even as regards the persons who were not parties to the agreement, who were not represented at the time and who do not derive title through any of the parties to the agreement.

The next point for consideration is whether the plaintiff has any right to question the said agreement. She would undoubtedly have a *locus standi* to maintain a suit and get a declaration that the agreement is not binding on her if she is a contingent heir to the estate of Sheo Shobhit Rai. In 1926 when the agreement was executed she was undoubtedly not an heir under the strict Hindu law. But in 1929 Act II of 1929 came into force. It is contended on behalf of the plaintiff that she has become an heir by virtue of this enactment. On the other hand, it is urged on behalf of the respondents that to hold that she is an heir would be giving to this Act a retrospective effect inasmuch as Sheo Shobhit Rai had died before the Act came into force even though the succession may open afterwards.



There is considerable preponderance of authority in favour of the view that the plaintiff can take advantage of this Act. This question arose in this Court soon after the coming into force of the Hindu Law of Inheritance (Amendment) Act, and one of us in S.A. No. 1331 of 1930, decided on the 1st of December, 1930, held that as reversioners have no vested interest in the estate at all but have a mere *spes successionis* or a chance of succession, which is a purely contingent right which may or may not accrue, and the succession would not open out until the widow dies, the person who would be the next reversioner at the time would succeed to the estate and the alteration in the rule of the Hindu law brought about by the Act would then be in full force. It was clearly stated that "by holding that in view of this Act the plaintiff at the present moment is not the next reversioner, one is not giving a retrospective effect to the Act". This decision was affirmed by the Letters Patent Bench in *Bandhan Singh v. Daulata Kuar* (1). A learned single Judge of the Lahore High Court whose attention was apparently not drawn to these cases took a contrary view in *Janki v. Sattan* (2), and a Bench of the Madras High Court in *Gavarammal v. Manikammal* (3) followed the latter view. But the learned CHIEF JUSTICE of the Patna High Court in *Chulhan Barai v. Akli Baraini* (4) preferred the view expressed in Allahabad and held that where the succession opened out after the coming into force of the Act a sister can take advantage of the provisions of the Act even though the last male owner had died previously. Another Bench of the Lahore High Court, in the case of *Shrimati Shakuntla Devi v. Kaushalya Devi* (5), has in a very well considered judgment overruled the previous decision of the learned single Judge of that Court, and dissenting from the Madras view has accepted the Allahabad view. The same Bench in another case in *Sattan v. Janki* (6) again adhered to that view. Recently

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(1) [1932] A.L.J., 384.

(3) (1933) I.L.R., 57 Mad., 718.

(5) (1935) I.L.R., 17 Lah., 356.

(2) A.L.R., 1933 Lah., 777.

(4) A.L.R., 1934 Pat., 324.

(6) A.L.R., 1936 Lah., 139.



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another Bench of this Court, of which two of us were members, has expressed the opinion that if the succession opens after the coming into force of the Act, a sister is entitled to rank as an heir in the order mentioned in section 2; see *Raj Deo Singh v. Janak Raj Kuari* (1). In view of the well considered judgment of the Lahore High Court in *Shakuntla Devi's* case (2) it is no longer necessary to examine in detail the reasons given by the Madras High Court for the contrary view. The learned Judges of the Madras High Court had relied mainly on the language of the preamble and not so much on the language of the substantive section 2 itself. No doubt a preamble can be looked at when the section is ambiguous and it supplies a key to the mind of the legislature and indicates what its intention was, but where the language of the section is clear, a preamble cannot control its provisions. So far as section 2 is concerned it clearly lays down that a sister shall be entitled to rank in order of succession next after certain heirs. There are no limitations or conditions contained in that section. At the time when the succession opens it is therefore open to the sister to say that she is entitled as of right to rank as an heir to the estate of her brother after the other heirs named therein. In the Madras case emphasis was laid on the use of the words "a Hindu male dying intestate" and it was suggested that the word "dying" connotes a future tense and means a person who will die after the coming into force of the Act. The word "dying" by no means connotes a future tense, nor for the matter of that a past tense, exclusively. Taking it literally it would rather connote a present tense. But as pointed out by the learned Judges of the Lahore High Court in *Shakuntla Devi's* case (2) the word is a mere description of the status of the deceased and has no reference and is not intended to have any reference to the time of the death of a Hindu male. The expression merely means "in the case of intestacy of a Hindu male".

(1) [1936] A.L.J., 64.

(2) (1935) I.L.R., 17 Lah., 356.

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The second ground emphasised in Madras is that to allow a sister, whose brother had died before the Act came into force, to succeed as an heir would amount to giving the Act a retrospective effect, which it would not have in the absence of an express provision that it is retrospective. As pointed out in *Bandhan Singh's* case (1), one is not giving to the Act a retrospective effect if a sister is held to be an heir when the succession opens out after the coming into force of the Act. It would be giving to it a retrospective effect if it were held, for instance, that even though the succession opened out before the Act came into force she is entitled to claim the estate if the suit is brought after the Act.

Lastly it has been contended by the learned counsel for the respondents that the Act was never intended to confer a right of succession on persons who were not heirs previously, but that as indicated by the preamble the intention merely was to alter the order in which certain heirs of Hindu males dying intestate are entitled to succeed. It is therefore urged that inasmuch as a sister was not an heir under the Mitakshara law prior to 1919, the Act was never intended to cover her case. Such an intention would nullify the whole object of the Act. The Act as a matter of fact applies only to persons who but for the passing of this Act would have been subject to the law of the Mitakshara. It does not apply to persons subject to other laws. If we were to hold that inasmuch as a sister was not an heir under the Mitakshara law the Act does not apply to her, the result would be that the Act would be wholly inapplicable to a son's daughter, daughter's daughter, sister and sister's son who are mentioned in section 2 and who were not previously heirs under the Mitakshara law. Such a contention therefore cannot possibly be accepted.

As the present plaintiff was not represented in the previous agreement by the collaterals who obtained rights for themselves, and as a mere compromise by a Hindu

(1) [1932] A.L.J., 384.

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widow is not binding on the reversioners,—*Mahadei v. Baldeo* (1)—the plaintiff is entitled to question the agreement.

I would therefore answer the second question in the affirmative.

BENNET, J.:—I agree.

BAJPAL, J.:—I agree.

### MISCELLANEOUS CIVIL

1936  
April, 17

*Before Mr. Justice Ganga Nath and Mr. Justice Smith*  
DAU DAYAL (PLAINTIFF) v. RAM PRASAD (DEFENDANT)\*

*Agra Tenancy Act (Local Act III of 1926), section 230—Theka of agricultural lands and some shops for an entire sum of annual rent—Suit for arrears of rent—Jurisdiction—Civil and revenue courts.*

A suit for arrears of rent due on a joint theka of agricultural lands as well as some shops, the rent being fixed as one entire sum without any apportionment, is cognizable by the civil court. Such a suit is not one of the suits specified in the fourth schedule to the Agra Tenancy Act, and the revenue court can not entertain it and can not give adequate relief to the parties. The suit, therefore, is not excepted from the cognizance of the civil court by the provisions of section 230 of the Agra Tenancy Act. Further, as the rent was not apportioned, it was impossible for the plaintiff to split up his cause of action so as to file a suit in respect of the agricultural lands in the revenue court and another suit in respect of the shops in the civil court.

The parties were not represented.

GANGA NATH and SMITH, JJ.:—This is a reference by an Honorary Assistant Collector of Benares, through the Collector, under section 267, clause (2), of the Agra Tenancy Act (Act III of 1926) under the following circumstances.

A suit was brought for arrears of rent due under a *theka* given by the plaintiff to the defendant in respect

\*Miscellaneous Case No. 635 of 1935.

(1) (1907) I.L.R., 30 All., 75.

of some agricultural lands and shops. There was a joint lease for both the agricultural land and the shops, in which one rent was fixed for both the properties. The suit was filed by the plaintiff for the arrears of rent in the civil court, which returned the plaint for presentation to the revenue court, finding that the suit was not cognizable by it. The plaint was filed in the revenue court. The same objection of jurisdiction was taken by the defendant in the revenue court as was taken by him in the civil court. The defendant contended that the suit was not cognizable by the revenue court. Without going into this question of jurisdiction the revenue court gave a decree to the plaintiff. On appeal the case was remanded by the learned District Judge to the revenue court for retrial of the issue about jurisdiction which had not been disposed of by the revenue court. On the suit being remanded to the revenue court, the learned Assistant Collector has made this reference. He is of the opinion that the suit is not cognizable by him.

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The question for consideration is, which is the proper court to entertain and decide this suit? As already stated, the lease is a joint lease for agricultural land and for shops, reserving one sum of rent. If separate rents had been fixed for the agricultural land and for the shops, there would have been no difficulty, as a suit for arrears of rent for the shops could have been filed in the civil court, and a suit for arrears of rent for the agricultural land in the revenue court. The difficulty arises from the fact that only one rent has been fixed for both the properties. All suits of a civil nature are triable by the civil court. Under section 230, all suits and applications which are specified in the fourth schedule of the Tenancy Act have been excepted from the jurisdiction of the civil court. This suit does not fall under the fourth schedule of the Act, and consequently it is not cognizable by the revenue court. This being so, the only other court which is left to entertain the suit is the civil court.

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A similar point was considered in the case of *Sukhdeo v. Basdeo* (1). There a suit was brought by the plaintiffs who alleged that they were members of a joint Hindu family with the defendants, and they claimed as such a declaration of their right to the zamindari properties and the tenancy holdings owned by the family. The civil court entertained the suit and gave a decree to the plaintiffs declaring their rights in the zamindari property as well as in the tenancy holdings. On appeal, an objection was taken that the civil court had no jurisdiction to grant a decree for the declaration of the plaintiffs' rights in the fixed-rate and occupancy holdings. In support of the contention reliance was placed on sections 121 and 230 of the Agra Tenancy Act. Under sections 121 and 230, the plaintiffs' suit for declaration of their rights in the tenancy holdings was not cognizable by the civil court. It was observed there at page 953:

"It cannot be disputed that civil courts have exclusive jurisdiction to try all suits of a civil nature unless their cognizance is either expressly or impliedly barred; vide section 9 of the Civil Procedure Code. It is also clear that a suit is of a civil nature if the principal question in the suit relates to a civil right." . . . "The scheme and the provisions of the Agra Tenancy Act clearly indicate that the legislature intended to vest revenue courts alone with jurisdiction to decide all disputes concerning tenancy holdings, but there is nothing in the Act to imply that if some of the reliefs prayed for in a suit can only be granted by the civil court, the jurisdiction of the civil court is ousted by the mere fact that the relief for a declaration of right to a certain holding is coupled with the other reliefs. Nor is there anything in the Act to show that if the cause of action entitles the plaintiff, over and above a declaration of his right to a holding, to certain other reliefs, for instance, declaration of his right to zamindari property, the plaintiff must split his cause of action in two parts and sue for a declaration of his right to the holding in the revenue court, and claim redress with respect to the zamindari property from the civil court. To hold otherwise would be to ignore the words, 'based on a cause of action in respect of which adequate relief could be

(1) (1935) I.L.R., 57 All., 949.

obtained by means of any such suit or application', used in section 230 of the Act."

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As already stated, the revenue court cannot entertain the suit, and cannot give adequate relief to the parties. Nor does the present suit fall under the fourth schedule. Consequently it is the civil court only which can entertain the suit and give adequate relief.

It may also be mentioned that it is not possible for the plaintiff to split up his cause of action so as to file a suit in respect of one part of his cause of action in one court, and in respect of the other in the other court.

In these circumstances we hold that the suit is triable by the civil court. The plaint will therefore be returned by the learned Assistant Collector to the plaintiff for presentation to the civil court.

#### APPELLATE CIVIL

*Before Mr. Justice Thom and Mr. Justice Rachhpal Singh*

RADHA NATH MUKERJI AND OTHERS (PLAINTIFFS) v.  
SHAKTIPADO MUKERJI AND OTHERS (DEFENDANTS)\*

1936

April, 20

*Hindu law—Marriage—Gotra—Change of woman's gotra on marriage—Widow does not revert to her father's gotra—Remarriage of widow with a person of her father's gotra—Validity.*

Upon her marriage a Hindu woman passes out of her father's gotra into her husband's gotra. When she becomes a widow she retains this latter gotra and does not revert to her father's gotra. The widow can, therefore, validly marry a second husband who may be of her father's gotra.

Messrs. *P. L. Banerji* and *H. P. Sen*, for the appellants.

Messrs. *Gadadhar Prasad* and *Satnarain Prasad*, for the respondents.

THOM and RACHHPAL SINGH, JJ.:—This is a plaintiffs' appeal arising out of a suit for possession over certain properties including movables, and for a declaration that the plaintiffs have a right to administer a trust as the

\*First Appeal No. 423 of 1932, from a decree of Mathura Prasad, Additional Subordinate Judge of Benares, dated the 16th of June, 1932.

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duly appointed *shebait*s, and also for costs and future mesne profits.

\* \* \* \* \*

[Only those portions of the judgment which are material for the purpose of this report have been given below.]

The trust property in dispute was endowed by one Swami Purnanda Saraswati, who, before he turned an ascetic, was a Bengali Brahmin and a Mukerji.

\* \* \* \* \*

The plaintiffs alleged that the daughter Nritya Kali married one Purna Chandra Banerji, who died when Nritya Kali was still a young girl, and that she subsequently married one Har Prasad Mukerji. The plaintiffs appellants are the sons of Nritya Kali by her marriage with Har Prasad Mukerji. They are the legal representatives, therefore, of the founder of the *math*, Purnananda. By a will executed on the 31st December, 1912, Nritya Kali appointed the plaintiffs as *shebait*s of the *math*.

The defendants however contend that Nritya Kali's marriage with Har Prasad Mukerji was invalid, that her sons are not legitimate and therefore not the legal representatives of Purnananda the founder of the endowment. This contention is based upon the theory that Nritya Kali married a Mukerji, that is, she married within her father's *gotra*. Such a marriage is by Hindu law invalid and is not legalised by the provisions of the Hindu Widows' Remarriage Act of 1856. The learned Subordinate Judge accepted the defendants' contention on this point and dismissed the suit.

Now, as already observed, it has been alleged that Nritya Kali prior to her marriage to a Mukerji was married to one Purna Chandra Banerji. That she was married prior to her marriage with Har Prasad Mukerji is not in doubt. The evidence as to who, in fact, Nritya Kali was first married to is somewhat meagre. The allegation that she was married to a Banerji rests upon



the somewhat vague admission of defendant No. 1. In our view, however, it is not important to ascertain who was Nritya Kali's first husband. Quite clearly she could not have been married to a Mukerji, as marriage within her father's *gotra* would have been invalid. What is important, however, is that whoever her first husband was, she left her father's *gotra* and entered the *gotra* of her husband. On this question we were referred to the decision in the case of *Lallubhai Bapubhai v. Cassibai* (1) and also to Banerjee's Hindu Law of Marriage and Stridhan, fifth edition, page 62.

Learned counsel for the respondents however contended that on the death of her first husband Nritya Kali returned to the *gotra* of her father. In support of this proposition he referred to Banerjee's Hindu Law of Marriage and Stridhan, fifth edition, page 309. The particular passage upon which learned counsel for the respondents relied is as follows: "Vidyasagar maintains that her father's *gotra* is to be deemed the *gotra* of a widow for the purpose of her remarriage; and considering that her father or some other paternal relation is still her guardian in marriage, I think that view is in accordance with the intention of the Act." The learned author bases his view, that for the purpose of remarriage the widow's *gotra* must be taken to be that of her father, upon the expression of opinion of an eminent sociologist who lived about the middle of last century. We do not regard this passage in the volume referred to as sufficient authority for the proposition which, if given effect to in the present case, would have the result of making the marriage which was solemnized so far back as 1886 invalid, and of bastardising the entire issue of that marriage. There is the definite authority of the Judicial Committee of the Privy Council for the proposition that upon marriage the wife passes into her husband's *gotra*, viz., the decision in the case of *Lallubhai Bapubhai v. Cassibai* (1) referred to above. There is no definite

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(1) (1880) I.L.R., 5 Bom., 110 (118).



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authority for the other proposition that upon the death of her husband the widow passes again into her father's *gotra*. In the absence of any clear authority we are not prepared to accept the contention of learned counsel for the respondents and we hold that Nritya Kali passed out of her father's *gotra* upon her first marriage and therefore the marriage between herself and a Mukerji, which marriage was celebrated somewhere about the year 1886, was a valid marriage; and that her sons are legitimate issue and the legal representatives of Purnananda, the founder of the endowed property.

As we have already observed, the legal representatives of the founder are entitled to succeed as *shebait*s where no appointment has been validly made under the provisions of the deed of endowment. It follows that the plaintiffs are entitled to possession of the endowed property.

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### FULL BENCH

*Before Sir Shah Muhammad Sulaiman, Chief Justice,  
 Mr. Justice Bennet and Mr. Justice Harries*

1936  
April, 21

RAM DHAN AND ANOTHER (DEFENDANTS) v. CHUNNI  
 KUNWARI (PLAINTIFF)\*

*Civil Procedure Code, section 11, explanation IV—Constructive res judicata—Suit by second mortgagee, in which validity of first mortgagee's decree was admitted—Third mortgagee, created after the suit, paid off the first mortgagee's decree—Third mortgagee impleaded in suit as a subsequent transferee—Third mortgagee not appearing and setting up a claim of priority by payment of first mortgagee's decree—Subsequent suit claiming such priority—Whether barred by res judicata.*

The first mortgagee obtained a decree for sale on his mortgage and purchased the property at the execution sale. Before

\*Second Appeal No. 1467 of 1933, from a decree of Muhammad Zamir-uddin, Additional Subordinate Judge of Bareilly, dated the 16th of August, 1933, reversing a decree of Jamil Ahmad, Additional Munsif of Bareilly, dated the 7th of May, 1931.

the sale was confirmed the second mortgagee (who was the same person as the first mortgagee) brought a suit on his mortgage, in which he set forth the first mortgage and the execution sale thereon; he claimed that he should be paid the surplus sale proceeds, but that in case the previous execution sale was set aside then the mortgaged property should be sold for realisation of his money. A third mortgage was created after the filing of this suit, and the third mortgagee discharged the first mortgagee's decree, and the execution sale was set aside. The second mortgagee then impleaded the third mortgagee as a subsequent transferee in the suit, but made no mention of the discharge of the first mortgagee's decree by the third mortgagee. The third mortgagee did not appear and set up a claim of priority on the ground of having discharged the first mortgagee's decree, and the suit was decreed without any provision as to whether the sale was to be subject to, or free from, any prior encumbrance. The third mortgagee then brought a suit for a declaration that she had the rights of a prior mortgagee by reason of the discharge of the first mortgagee's decree:

*Held*, that the suit was not barred by *res judicata* by reason of the *ex parte* decree passed in the second mortgagee's suit, in which the third mortgagee had not appeared and expressly claimed her right of priority; for, the validity of the prior mortgage decree was not in any way disputed by the second mortgagee in his suit—indeed it was expressly admitted—and therefore the matter was not in issue at all and there was no occasion for the third mortgagee to set up the validity of that mortgage decree or the rights acquired by her *pendente lite*. She was a necessary party in her capacity as a subsequent transferee, but not a necessary party in her capacity as a prior mortgagee. As the validity of the prior mortgage was admitted in the plaint, and she was professedly impleaded as a subsequent transferee, there could be no reason to require that she must necessarily have appeared in court and set up rights under the prior mortgage which was not disputed by the plaintiff.

If the decree had directed that the property was to be sold free from any prior encumbrances the result might have been different, but there was no such direction in the present case.

*Sri Gopal v. Pirthi Singh* (1) and *Mahomed Ibrahim Hossain v. Ambika Pershad Singh* (2), distinguished.

Messrs. G. S. Pathak and Gopalji Mehrotra, for the appellants.

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(1) (1902) I.L.R., 24 All., 429.

(2) (1912) I.L.R., 39 Cal., 527.

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Messrs. *B. Malik* and *S. N. Gupta*, for the respondent.  
SULAIMAN, C.J., BENNET and HARRIES, JJ.:—It appears that on the 16th August, 1918, a simple mortgage deed was executed by Karam Ali in favour of the defendants appellants and their mother Mst. Jaidei. On the 22nd August, 1922, a decree for sale was obtained on this mortgage, which was followed by a final decree. The property was put up for sale in execution of this decree and was purchased at auction by the defendants, the then decree-holders, on the 21st December, 1926. The decree was for over Rs.2,000 and the property was sold for about Rs.3,700, there being a surplus amount of Rs.1,065.

In the meantime the defendants had taken another mortgage from Karam Ali on the 18th July, 1923. Before the auction sale which had been held in execution of the decree in the first mortgage could be confirmed, the defendants brought a second suit on the 22nd December, 1926, on the basis of the second mortgage. In their plaint the present defendants clearly admitted the existence of the previous mortgage and even mentioned that in execution of their mortgage decree they had purchased the mortgaged property at auction and there was a surplus of Rs.1,065 left over. They did not implead the present plaintiff Mst. Chunni Kunwar as she had not come on the scene by that time. The reliefs claimed were: (a) a declaration that the plaintiffs were prior mortgagees against the defendants who had then been impleaded and were entitled to receive the entire surplus purchase money at the auction sale held on the 21st December, 1926, in execution of the decree of 1922; (b) a decree for recovery of the amount left outstanding after the payment of the surplus purchase money to be realised; and (c) "if the sale of the mortgaged property be for some reason set aside, the claim with costs be ordered to be paid from the defendant, and in case of default in payment the mortgaged property be sold and the claim be satisfied out of the purchase money".

It is therefore obvious that the present defendants who were plaintiffs at that time were admitting the validity of the prior mortgage and the binding character of the mortgage decree and the propriety of their having purchased the property in satisfaction of the mortgage debt, leaving a surplus of Rs.1,065 only, and asked for the payment of only the surplus purchase money in the first instance, thereby clearly admitting that they were entitled only to this surplus amount under the second mortgage decree. It is also clear that they contemplated the contingency of the sale of the mortgaged property being for some reason set aside, as by that time it had not yet been confirmed, and in that event they asked for a decree for the whole amount due under the second mortgage. It cannot therefore be contended for a moment that the defendants in the latter event intended to give up their first mortgage decree altogether. It is impossible to put any such interpretation on the plaint.

On the 17th January, 1927, the mortgagor executed a usufructuary mortgage in favour of the present plaintiff Chunni Kunwar, leaving money in her hands for payment of the first mortgage decree. She deposited the amount on the 20th January, 1927, and at some later, but unknown, date, the auction sale in favour of the present defendants was set aside. On the 7th February, 1927, the present defendants in their suit filed an application asking that Mst. Chunni Kunwar be impleaded as a subsequent transferee, presumably because she had taken the usufructuary mortgage. There was no allegation that she had paid off the prior mortgage decree and should be impleaded as a prior mortgagee. Of course there was no allegation against her when the plaint was filed, and no amendments were made therein, except the addition of her name as a subsequent transferee. Service was duly effected on her, but she did not appear to contest the claim, nor filed any written statement. The suit for the amount due on the second mortgage was decreed on the 14th April, 1927. The decree, however,

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did not say that the property would be sold free from any previous incumbrances.

The defendants then put their decree in execution and claimed a sale of the mortgaged property. Upon this the present suit was instituted by Mst. Chunni Kunwar for a declaration that she had the rights of a prior mortgagee on account of her discharge of the prior mortgage decree. The present defendants resisted the claim on two main grounds among others: (1) That not having set up her prior mortgagee rights in the suit of the second mortgagee, the defence was barred by the principle of *res judicata*; and (2) that by payment of the mortgage decree she acquired no rights of subrogation as the claim on the mortgage of 1918 would now be barred by time.

As the second question has been considered recently by a Full Bench of this Court in *Alam Ali v. Beni Charan* (1), it has not been referred to us. But the first question has been referred to us in the following form: "In the circumstances of the present case, does the *ex parte* decree obtained on the 14th April, 1927, by the defendants appellants operate as *res judicata* for the purposes of the present suit, and is the declaration now sought for by the plaintiff respondent therefore barred?"

*Prima facie* it would appear that when the validity of the prior mortgage decree was in no way disputed by the then plaintiffs, and indeed was expressly admitted inasmuch as only the surplus amount was claimed in the first instance, it cannot be seriously contended that the binding character of that mortgage decree was in any way a matter in issue in the previous suit. The plaintiffs had not attempted to impugn the rights under that mortgage decree. Accordingly even though subsequently during the pendency of that suit those rights devolved upon the present plaintiff, who had then been impeaded as a subsequent transferee, there was no occasion for her to set up the validity of that mortgage decree or the

(1) (1935) I.L.R., 58 All., 602.

rights acquired by her *pendente lite*. The matter not having been put in issue by the plaintiffs on the date on which the plaint was filed on the 22nd December, 1926, the defendant Chunni Kunwar was not called upon to appear and set up her prior rights. Under the explanation to order XXXIV, rule 1 it is not necessary for a puisne mortgagee to implead a prior mortgagee, and he may without impugning such a mortgage claim to sell the property subject to it. A person who has taken a subsequent mortgage and also possesses prior mortgagees' rights has a dual capacity. She is a necessary party in her capacity as a subsequent transferee, but not a necessary party in her capacity as a prior mortgagee. If therefore the validity of the prior mortgage is admitted in the plaint and she has been professedly impleaded as a subsequent transferee, there seems no reason to require that she must of necessity appear in court and set up rights under the prior mortgage which is not disputed by the plaintiffs.

The learned advocate for the appellant relies strongly on the case of *Sri Gopal v. Pirthi Singh* (1). In that case suits had been brought on mortgages of 1872 and 1874 successively without impleading other mortgagees, and decrees were obtained thereon. Then a suit was brought on a mortgage of 1876 impleading the mortgagees of 1872 and 1874. In the plaint the plaintiff had clearly sought to establish that charge as having priority over the earlier mortgages above referred to, upon the ground that the money thereby secured had been borrowed to pay and had been applied in paying certain other charges on the same property of still earlier date, all being prior to 1871 (see page 435). Thus the plaintiff had put in issue his claim of priority over the mortgages of 1874. The mortgagee Ishur Das set up his prior claims under a mortgage of 21st July, 1871, but he altogether omitted to set up his claim under a mortgage of 7th February, 1874. The plaintiff's suit was

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decreed for payment of the money due against the defendants and the decree declared that in default of payment the plaintiff would be entitled to sell the mortgaged property "which was free from all encumbrances", and also the remaining properties in satisfying the amount of certain prior debts detailed at the foot of the judgment. In this list the mortgage of the 7th February, 1874, was not included. It was accordingly held both by this High Court and also by their Lordships of the Privy Council that the omission to set up the rights under the mortgage of 7th February, 1874, was fatal and the claim made in a subsequent suit was barred by the principle of *res judicata*. That was a case in which the plaintiff had never admitted the priority of the mortgage of the 7th February, 1874, and where the decree had expressly ordered the sale of certain property free from all encumbrances and the sale of the remaining properties subject only to certain specified prior debts and no others. That case is accordingly distinguishable from the present one.

The learned advocate next relies on the case of *Mahomed Ibrahim Hossain v. Ambika Pershad Singh* (1). In that case the heirs of Mst. Alfian were impleaded as puisne mortgagees having the right to redeem. As noted in the judgment of the High Court at page 539, "The plaintiffs asked for sale of the mortgaged properties free from the liens of all the puisne mortgagees." The prior rights of the heirs of Alfian were never admitted by the plaintiffs in their plaint and in fact they had been impleaded exclusively as subsequent transferees. The Calcutta High Court considered that the case was governed by the ruling of their Lordships in the case of *Sri Gopal v. Pirthi Singh* (2). Their Lordships of the Privy Council formed the view that the heirs of Alfian having been made defendants to those suits, and not having set up in those suits such rights as they had under the prior mortgage, their claim in the later suit was

(1) (1912) I.L.R., 39 Cal., 527.

(2) (1902) I.L.R., 24 All., 429.



barred by the principle of *res judicata*. As in that case the plaintiffs had not admitted in the plaint that the prior mortgagee rights were even subsisting and had asked for the sale of the mortgaged properties free from the liens of all the defendants, the case is obviously distinguishable from the present case.

In a later case, *Radha Kishun v. Khurshed Hossein* (1), their Lordships have laid down the law clearly. In a suit brought by the second mortgagees who were certain Sahus, a prior mortgagee Bakhtaur Mull was impleaded as a defendant, "but whether any or what relief was sought against him did not appear" (page 668). Their Lordships, after pointing out that the implications of the terms of section 96 of the Transfer of Property Act were that without the consent of the prior mortgagee the mortgaged property could not be sold free from his mortgage, remarked (page 669): "Bakhtaur Mull's position therefore was that he was a prior mortgagee with a paramount claim outside the controversy of the suit unless his mortgage was impugned. Consequently, to sustain the plea of *res judicata* it is incumbent on the Sahus in the circumstances of this case to show that they sought in the former suit to displace Bakhtaur Mull's prior title and postpone it to their own. For this it would have been necessary for the Sahus as plaintiffs in the former suit to allege a distinct case in their plaint in derogation of Bakhtaur Mull's priority. But from the records of this suit it does not appear that anything of the kind was done, and, as has been observed, of things that do not appear and things that do not exist the reckoning in a court of law is the same." Their Lordships accordingly held that Bakhtaur Mull's mortgage not having been impugned expressly, he was not prevented by any principle of *res judicata* from setting up his rights under that mortgage in a subsequent suit.

The case before us is much stronger inasmuch as here not only the present plaintiff's rights were not, and could

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not be, impugned in the plaint when it was filed on the 22nd December, 1926, but it was clearly admitted that the prior mortgage was subsisting and was paramount. The case is similar to the cases decided by this Court in *Ajudhia Pande v. Inayat-ullah* (1) and *Collector of Moradabad v. Muhammed Hidayat Ali Khan* (2).

In our opinion the claim of the plaintiff that she has acquired rights by payment of the money due on the prior mortgage decree is not barred by the principle of *res judicata*.

The answers to both parts of the question referred to us are in the negative.

Before Mr. Justice Thom, Mr. Justice Niamat-ullah and  
 Mr. Justice Rachhpal Singh

1936  
 April, 22

MAIKOO LAL AND ANOTHER (APPLICANTS) v. SANTOO  
 AND OTHERS (OPPOSITE-PARTIES)\*

*Succession Act (XXXIX of 1925), section 63—Will—Attestation—Attesting witnesses not signing but affixing their marks—Validity—"Sign"—General Clauses Act (X of 1897), section 3(52)—Interpretation of statutes—Ambiguity.*

A will is validly attested, within the meaning of the provisions of section 63 of the Succession Act, if either of the two necessary attesting witnesses has merely affixed his mark to the will.

In view of the definition of "sign" as given in section 3(52) of the General Clauses Act the word "sign" in clause (c) of section 63 of the Succession Act should be interpreted to include affixing a mark, although the section is ambiguous inasmuch as a distinction has been drawn in clauses (a) and (b) of the section between signing and affixing a mark.

Where a section is ambiguous and two interpretations are possible, that interpretation should prevail which is most consistent with reason, common sense and convenience.

Mr. Ram Nama Prasad, for the appellants.

Messrs. S. N. Seth and Brij Narain Mehrotra, for the respondents.

\*First Appeal No. 54 of 1935, from an order of S. Iftikhar Husain, Additional District Judge of Cawnpore, dated the 19th of January, 1935.

(1) (1912) I.L.R., 35 All., 111.

(2) (1926) I.L.R., 48 All., 554.

THOM, NIAMAT-ULLAH and RACHHPAL SINGH, JJ.:—

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The question referred to this Bench for decision is as follows: "Is a will validly attested within the meaning of the provisions of section 63 of the Indian Succession Act if either of the attesting witnesses has merely affixed his mark to the will?"

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The material portions of section 63 of the Succession Act are as follows: "(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction. (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will. (c) The will shall be attested by two or more witnesses each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will in the presence and by the direction of the testator, . . . and each of the witnesses shall sign the will in the presence of the testator . . ."

Learned counsel for the appellants contended that a will was validly attested if the witnesses simply affixed their mark to the document. In support of his argument he referred to section 3, sub-section (52) of the General Clauses Act. Sub-section (52) is as follows: "'Sign', with its grammatical variations and cognate expressions, shall, with reference to a person who is unable to write his name, include 'mark', with its grammatical variations and cognate expressions." Learned counsel contended that in view of the aforementioned provision of the General Clauses Act the signature of a witness included his mark and that therefore a document was not invalid merely upon the ground that a witness had affixed his mark to the document instead of his signature.

Learned counsel for the respondents, upon the other hand, contended that in section 63 of the Indian Succession Act the legislature has drawn a clear distinction between signature and mark. In particular learned counsel referred to the fact that by sub-section (a) of

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section 63 it is open to the testator either to sign in the sense of actually writing his signature, or to affix his mark, but the person who may sign for him must affix his signature; it is not open to him merely to affix his mark. Similarly learned counsel contended that in sub-section (c) of section 63 there is the same clear distinction drawn between signature and mark. In this section, he contended, it is implied that the testator may sign in the sense of writing his signature or he might affix his mark, but it is enjoined that the witnesses must sign. The expression used is "and each of the witnesses shall sign", not that "each of the witnesses shall sign or affix his mark".

It is clear from a consideration of the terms of section 63 as a whole that the legislature intended that, where the testator was unable either to sign or to affix his mark the third person who signed for him had to sign by writing his signature and the name of the testator. It is not open to him merely to affix his mark.

It is further clear, in view of the provisions of sub-section (52) of section 3 of the General Clauses Act, that section 63 of the Indian Succession Act has been drafted in a careless and slovenly manner.

Two interpretations of the section are possible. It is possible to interpret the section as urged by learned counsel for the respondents and to hold that so far as the attestation of wills is concerned the legislature intended to draw a clear distinction between the signing of the will in the sense of writing the signature on the one hand and the affixation of the mark of a person on the other; and that so far as the person signing for the testator, and the witnesses, are concerned the legislature intended the signature, in the sense of writing the actual signature, to be essential.

On the other hand, it is possible to interpret the section in the light of sub-section (52) of section 3 of the General Clauses Act, and to construe the expression "and each of the witnesses shall sign" with particular reference to that sub-section.

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The question which we have to decide is as to which interpretation should in the circumstances be adopted. In other words, what interpretation is consistent with the intention of the legislature so far as that intention is to be gathered from the language of the Act.

Section 3 of the Transfer of Property Act defines the word "attested" and in the definition the same distinction is drawn between the executant and the witnesses. The executant may sign or affix his mark, but the witnesses must sign.

The definition of "attested" in section 3 of the Transfer of Property Act was considered by a Bench of the Madras Court in the case of *Nagamma v. Venkatramayya* (1). In that case it was held that a document was validly attested even though one of the witnesses had merely affixed his mark to the document as a witness. In the course of his judgment the learned CHIEF JUSTICE refers to the English law upon this point. He quotes from Halsbury's Laws of England the following passage: "To make a valid subscription a witness must either write his name or make some mark intended to represent his name. A will may be subscribed by marks even though the witnesses are capable of writing." This principle is supported by the author of Jarman on Wills, volume I, 7th edition, page 103. The learned CHIEF JUSTICE then proceeds: "In England, therefore, where people are far more literate than in India, the mark of a marksman is a sufficient attestation to a will. It is difficult to see any sufficient reason for the application of a stricter rule in India where the large majority of people are illiterate." We find ourselves in complete agreement with the view which has been expressed in that case upon this point.

Learned counsel for the respondents referred to two earlier cases, *Fernandez v. Alves* (2) and *Nitye Gopal Sircar v. Nagendra Nath Mitter* (3). In both these cases the decision was that a will was not validly attested if

(1) (1934) I.L.R., 58 Mad., 220. (2) (1879) I.L.R., 3 Bom., 382.  
(3) 1885 I.L.R., 11 Cal., 429.

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the witnesses had not actually signed the document. As was observed, however, in the Madras case referred to above, these cases were decided before the General Clauses Act of 1897. Prior to this Act there was no statutory definition of the word "sign".

As we have already observed there are two possible interpretations of section 63 of the Indian Succession Act. The interpretation for which learned counsel for the respondents contended would undoubtedly lead to most untoward results in these provinces. In the large majority of cases, for example, mortgages are attested by illiterate witnesses who merely affix their marks to the documents. The same is true of testamentary deeds. If we are to hold that the legislature intended that witnesses must sign the documents which they attest and not merely affix their marks thereon, it will follow that all these deeds will be invalid. We should be reluctant to interpret the section in such a way that such consequences would ensue. Undoubtedly the section is ambiguous. Its ambiguity arises from careless draftsmanship. Two interpretations are possible, and apart from authoritative decision, in our view the court should be guided by the general principle that that interpretation should prevail which is most consistent with reason, common sense and convenience. That principle has been enunciated in Maxwell on Statutes, 7th edition, at page 166. In section 1 dealing with presumption against intending what is inconvenient or unreasonable, the learned author states: "In determining either the general object of the legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice and legal principles should, in all cases of doubtful significance, be presumed to be the true one."

Undoubtedly the interpretation which is most in accord with convenience, reason, justice and legal principles is the interpretation for which the appellants contend. Furthermore we would observe that we can

see no reason whatever why the legislature should have deliberately excluded illiterate persons as witnesses to testamentary dispositions in a country where the large majority of the people are illiterate.

For the above reasons we are of opinion that a will is validly attested within the meaning of the provisions of section 63 of the Indian Succession Act if either of the two necessary attesting witnesses has merely affixed his mark to the will. We answer the question referred to this Bench accordingly.

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### APPELLATE CIVIL

*Before Mr. Justice Bennet and Mr. Justice Smith*

And on a reference

*Before Sir Shah Muhammad Sulaiman, Chief Justice*

MUNICIPAL BOARD, AGRA (DEFENDANT) v. RAM LAL  
(PLAINTIFF)\*

1936

March, 19

*Municipalities Act (Local Act II of 1916), section 97—Written contract between Municipal Board and a contractor to execute unspecified repairs and constructions as might be ordered by municipal engineer during one year—Validity—Whether a separate written contract for each item of work necessary.*

April, 22

A written contract, signed by a contractor as well as by the chairman and the executive officer of a Municipal Board, was entered into, by which the contractor undertook to execute such repairs and constructions as might be ordered by the municipal engineer from time to time during the period of one year; he was to be paid at the rates enumerated in the schedule of rates sanctioned by the Municipal Board; and on failure to carry out any such order he would forfeit the security deposit and the contract would be annulled. Details or specifications of the items of works that might be ordered by the municipal engineer during the said period were not given in the contract:

*Held*, (SMITH, J., *contra*) that the contract fulfilled the requirements of section 97 of the Municipalities Act and was valid, although it did not specify and detail the various items

\*First Appeal No. 419 of 1932, from a decree of M. A. Nomani, Subordinate Judge of Agra, dated the 24th of June, 1932.

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of work that might be required to be done. In the case of such a contract the provisions of section 97 did not require that if any of the items of work ordered to be done exceeded Rs.250 in value a separate written contract for each such item was to be entered into.

Dr. N. P. Asthana and Mr. B. N. Sahai, for the appellant.

Messrs. S. K. Dar and S. K. Mukerji, for the respondent.

BENNET, J.:—This is a first appeal by the Municipal Board of Agra through its chairman against a decree of the learned Subordinate Judge of Agra in favour of the plaintiff, a contractor Babu Ram Lal. The plaintiff claimed that the plaintiff had constructed 23 works in the year 1930, the works being completed in April, May, June and July of that year, and that there was a balance due to the plaintiff of Rs.4,696 on these works and also three items of security of Rs.300, Rs.50 and Rs.50. Paragraph 3 of the plaint stated: "That in response to the orders placed with him by the Municipal Board, Agra, through the defendants Nos. 2 and 3, the plaintiff during the year 1930-31 executed repairs and the constructions of the work specified in annexure A, which also gives full particulars about the dates on which the respective works were completed and on which the bills relating thereto were delivered to the defendant Board as well as the amounts of the bills." Paragraph 2 of the plaint stated that on the 2nd April, 1930, the plaintiff and the defendant No. 1, acting through its chairman, executed an agreement providing that the plaintiff was to execute repairs and constructions of all works that might be ordered by the Municipal Engineer, Agra, from time to time during the period ending 31st March, 1931; that the plaintiff should be paid for the works done at the rates enumerated in the schedule of rates sanctioned by the Municipal Board, Agra, and that if the plaintiff refused to execute any work given to him by the Board's engineer, the defendant Board would have the power to cancel his contract and to forfeit his security deposit of



Rs. 300. These terms are embodied in a written agreement signed by the chairman and the executive officer and also by the contractor on a paper bearing a stamp of Rs. 3 value. Various pleas were taken in the written statement in regard to various works.

[Only those portions of the judgment are given below which relate to the point on which there was a difference of opinion and which was referred to a third Judge.]

In paragraph 15 an objection was taken against various serials that they were not sanctioned by the Public Works Committee and the Board as provided under section 97 of the Municipal Act and under Government Notification No. 1906/XI—6H, dated 15th July, 1916, and the Board was therefore not legally bound to pay the said amount.

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The lower court had the argument chiefly addressed to it on issues Nos. 1 and 2: "(1) What works were constructed without the sanction of the Board? What is their value and which of the defendants is liable to pay? (2) Do the sections 96 and 97 of the Municipal Act bar the plaintiff's claim?" Under these issues the lower court alludes to the contract in writing of the 2nd April, 1930, and the argument was made before the court that this contract would not come under section 97 of the Municipalities Act, which provides as follows:

"(1) Every contract made by or on behalf of a Board whereof the value or the amount exceeds Rs. 250 shall be in writing.

"(2) Every such contract shall be signed (a) by the chairman or a vice-chairman and by the executive officer or a secretary, or (b) by any person or persons empowered under sub-section (2) or (3) of the previous section to sanction the contract if further and in like manner empowered in this behalf by the Board.

"(3) If a contract to which the foregoing provisions of this section apply is executed otherwise than in conformity therewith it shall not be binding on the Board."

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It will be noted that sub-section (3) states that if a contract does not conform to these provisions, then it will not be binding on the Board, and therefore if the appellant can show that the requirements of section 97 are not satisfied, then it is not open to the plaintiff to claim under sections 65 and 70 of the Indian Contract Act that he should receive payment for the work done on the principle of *quantum meruit*. On the other hand in regard to section 96 there is no such provision, and the allegations of the appellant that the requirements of section 96 or of certain notifications of Government are not satisfied will not prevent the principle of *quantum meruit* under sections 65 and 70 of the Indian Contract Act from applying. The argument therefore addressed to the lower court was largely on section 97 and that argument has been part of the argument in appeal before us. Now the argument is that the written contract which was executed will not satisfy the requirements of section 97 because it makes provision for the contractor performing all works that are ordered by the municipal engineer, and the argument is that there ought to be a separate written contract for each work. Learned counsel on both sides have not been able to produce any ruling precisely on this point. The wording in section 97 is perfectly general and the reference is merely to "every contract". Now a contract is defined in section 2 of the Contract Act [clauses (a), (b), (e) and (h) of section 2 were here set forth.] Now examined by these considerations there is no doubt that the document, dated the 2nd April, 1930, is a contract. The argument, however, which has been addressed to us is that a separate contract must be made for each separate work, and apparently under this argument the contract in question would be of no validity at all because it does not relate to any special work. It is obvious that the evidence given orally that certain works were to be done would not offend against the principles of section 92 of the Evidence Act, because from the very nature of the agreement it is provided that instructions may be given as to what works

should be done. The works which the Board had in contemplation, as shown by annexure A to the plaint, consist of the construction of a number of drains and certain repairs and other small works for which it would be difficult to provide detailed plans and estimates. In particular the objection which has been taken to item No. 16 for constructing a *nala* in Tajganj is an objection which appears to me to be unsound. This drain was constructed, as shown by the bill of the contractor, in accordance with the scheduled rates of the Municipal Board, and it is not denied that the drain was constructed on the same plan and design as other municipal drains. In my opinion it would be extremely difficult to draw up a plan and estimate in advance to show exactly the amount of each kind of work, masonry work, excavation, brick work, concrete and lime, etc., which is detailed in this bill. It is much more practical to have an engineer indicate to a contractor in what place the drain is required and to allow the contractor to carry out this work according to the standard plan for drains and according to the standard rates. The Municipalities Act is intended to apply to municipalities all over the province and in these municipalities there frequently arise cases like the present where a contractor has to do a number of petty works and repairs. No doubt in the aggregate these petty works and repairs may total over Rs.250; but it does not appear to me that it is the intention of the section that every such item should require a separate written contract.

Now I may refer to certain rulings which have been given by this Court, although not precisely on the same point. One of these is contained in *District Board, Allahabad v. Baijnath Prasad* (1). That was a case where a point was raised on page 58 under the similar section 65 of the District Boards Act of 1922. This provides in similar terms that no contract shall be made on behalf of the Board of an amount exceeding Rs.100 except it is in writing and signed by similar officials. In that case

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a contract had been made and while the work was being done the sub-overseer of the Board gave on his own authority certain instructions to the contractor to use cement instead of mortar, and bricks of a better quality than third class bricks, and on account of this variation the contractor incurred an extra amount beyond the Rs.100 allowed by the section. The point was taken before this Court that as there was no written contract signed by a proper official for the extra amount incurred above Rs.100, therefore the contractor was not entitled to receive this amount under the bar in section 65(3). The Bench of this Court did not agree with this contention and observed: "The sub-overseer was acting for his superior officer, the District Board engineer, and it would certainly be inequitable if a contractor should suffer for carrying out the instructions of an officer of a District Board. In any case we do not think that section 65 applies to a case of this sort and the District Board cannot seek shelter under its provisions."

Another ruling which I desire to refer to is in *Munir Khan v. Municipal Board, Allahabad* (1). In that case the contract was that the contractor should receive a sum of Rs.325 per month for the supply of 13 animals and 11 carts to collect all night-soil and remove the same to *such place or places* as the Chairman, Public Health, of the Board *shall appoint*, and that such payment shall not be liable to any diminution or enhancement by reason of any variation in the number of animals, carts and drivers employed or in the amount of work required to be done by the contractor. Now in this agreement there was a provision that there could be an oral variation of the work to be done, that is the chairman could direct that the night-soil was to be taken to different places and there could also be a variation in the number of animals, carts and drivers employed. It was not shown or claimed that such a contract would be void under section 97 of the Municipalities Act. It is true that the point was not raised, but the case is of some value for showing

(1) [1930] A.L.J., 461.

that such a contract was before this Court and no such point was taken. It appears to me that although the parallel is not absolute, still there is a certain parallel between the present agreement providing for the contractor to construct the petty repairs and petty works of the nature in annexure A at the direction of the municipal engineer and the case where the sub-overseer orally varied the written contract and the case where the chairman was empowered to vary the contract for removal of night-soil. I am of opinion therefore that the present contract is one which sufficiently complies with the terms of section 97 of the U. P. Municipalities Act of 1916.

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On my view of the law the appeal would be dismissed.

SMITH, J.:—I have heard the judgment just now delivered by my learned brother. I regret that I am unable to agree with the view he takes of the effect of section 97 of the Municipalities Act. It seems to me that the general agreement that was arrived at between the plaintiff Ram Lal and the Municipal Board of Agra on the 2nd April, 1930, could not take the place of a contract in writing whenever any definite piece of work had to be carried out. As is pointed out by learned counsel for the appellant, this agreement is in quite general terms, and relates to no definite and specific piece of work at all. In my opinion the provisions of section 97 are partly, at any rate, designed to prevent general agreements of this nature being pleaded as justification for the giving of contracts for the carrying out of definite works. In my opinion the items in excess of Rs. 250 in the list appended to the plaintiff's plaint all required contracts in writing, as laid down by section 97 (1) of the Municipalities Act. These items are, apart from No. 2, which is not objected to on behalf of the appellant, six in number, namely Nos. 4, 6, 7, 8, 10 and 16 in the list. As regards No. 6 it appears that on the 3rd May, 1930, the plaintiff received from Mr. A. C. Sinha, the municipal engineer, a written "work order" to the following effect: "You are hereby informed that the work of

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paving and draining a lane at Tajganj near the house of B. Bishamber Nath has been given to you; you are therefore directed to commence the work and receive necessary instructions from the overseer. (Sd.) A. C. Sinha, Municipal Engineer." This so-called "work order" may in my opinion be regarded as a contract in writing within the meaning of section 97(1) of the Municipalities Act, and in view of the fact that the Municipal Board has not shown that the municipal engineer was not empowered to sign such contracts, I think that as regards this particular item it cannot be urged that the contract was not binding on the Board by reason of the provisions of section 97(3) of the Act. As regards the remaining five items, however, it is not shown that the plaintiff received any "work orders" or anything else in writing in respect of them, and in my opinion the plaintiff is debarred from claiming any amount in respect of those works by reason of the provisions of section 97, clauses (1), (2) and (3), of the Municipalities Act. The rulings to which we have been referred by learned counsel for the respective parties have already been set forth in the judgment of my learned brother, and it is not necessary for me to mention any of them again.

BY THE COURT:—We state the following point of law on which we differ: Is plaintiff's claim for items Nos. 4, 7, 8, 10 and 16 of annexure A of the plaint barred by the provisions of section 97, U. P. Municipalities Act of 1916, and does the written contract of April 2, 1930, not satisfy the requirements of that section?

We refer this point of difference to whatever Judge shall be selected by the Hon'ble Acting Chief Justice under the provisions of section 98 of the Civil Procedure Code.

SULAIMAN, C.J.:—The plaintiff respondent is a contractor and the defendant appellant is the Municipal Board of Agra. Admittedly an agreement was duly executed between the plaintiff and the defendant on the 2nd April, 1930, and was signed by the plaintiff contractor, as also by the chairman and the executive officer

of the Municipal Board. The question of the validity of this agreement itself is not before me. The plaintiff's claim was for recovery of amounts due to him from the Board for work done in pursuance of this agreement. One of the defences to the suit was that there should have been separate agreements for each item of work done by the plaintiff, and in the absence of such separate agreements the contract was not binding on the Board. I am not concerned with the other points which arose in the case. The two learned Judges before whom this case came up for hearing differed on the point mentioned above, and have accordingly referred the following point of law to me under section 98 of the Civil Procedure Code: "Is plaintiff's claim for items Nos. 4, 7, 8, 10 and 16 of annexure A of the plaint barred by the provisions of section 97, U. P. Municipalities Act of 1916, and does the written contract of April 2, 1930, not satisfy the requirements of that section?"

The contention on behalf of the defendant Board is that the provision in section 97, that every contract made by or on behalf of a Board whereof the value or the amount exceeds Rs.250 shall be in writing, means that if any item of work to be done exceeds the value of Rs.250 then there should be a separate contract for such item of work, and that the Board cannot enter into one contract for a large number of items each of which in value exceeds Rs.250, but that there should be so many different written contracts. It seems to me that section 97 is not capable of such an interpretation. There is obviously a clear distinction between a contract between two parties and the work done by either party in pursuance of it. "Contract" is defined in the Contract Act, section 2, as being an agreement enforceable by law, and an agreement comes into existence when the offer made by one party is accepted by the other.

I have therefore to see whether the document in question embodied the contract between the parties which is required by section 97 to be in writing. The agreement stated that the said contractor agreed and

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bound himself to execute the repairs and construction of all works that might be ordered by the municipal engineer from time to time during the period ending 31st March, 1931, and the said contractor agreed to execute and perform all works that might be ordered by the Board's engineer; that the said contractor shall be paid for the work done at rates enumerated in the schedule of rates sanctioned by the Municipal Board. There were other items in the contract as well, with which I am not just at present concerned. It also contained the covenant that if the contractor refused to execute any work given to him by the Board's engineer, the Municipal Board would have power to annul his contract and erase his name from the list of approved contractors, in which event the contractor would be liable to forfeit his security deposit. The plaintiff was, therefore, bound to execute repairs and construction of all works that were ordered by the municipal engineer at the peril of having his security deposit forfeited if he refused to execute any such work given to him by the Board's engineer. It is difficult to see why such an agreement cannot be the contract between the parties which is mentioned in section 97. The value of the work to be done for the period of one year was presumably to be in excess of Rs.250; therefore the contract was entered into in writing in order to fulfil the requirements of section 97. So far as the Board was concerned, it contracted to pay the contractor at the sanctioned scheduled rates for all repairs and construction of works that he might do on the orders given by the municipal engineer. No specifications and no restrictions were laid down. Very often it is impossible to know beforehand what sort of repairs would be required during the course of the following 12 months, and it may even be impossible to know beforehand what new constructions may be urgently required. It is therefore impossible to hold that unless a complete list of all the detailed items of work to be done during the whole period is given in the written agreement, there is no written contract as

required by law. In my opinion the contract was one and it is in writing, though the items of work to which the contract related were bound to be numerous.

With great respect, I am unable to agree with the view expressed by SMITH, J., that this written agreement by itself is not sufficient. I agree with the view expressed by BENNET, J., that this written contract fulfils the requirements of section 97. My answer to the question referred, therefore, is that the plaintiff's claim for the various items is not barred by the provisions of section 97 and that the written contract of April 2, 1930, satisfies the requirements of that section. Let the case be sent back to the Bench concerned for disposal.

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*Before Mr. Justice Bennet and Mr. Justice Harries*

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April, 23

*U. P. Town Improvement Act (Local Act VIII of 1919), sections 57, 59(6)—Tribunal determining amount of compensation—One of the assessors absent on one day of hearing, when some witnesses were examined—Substantial error or defect in procedure—Jurisdiction.*

A Tribunal constituted under the U. P. Town Improvement Act was engaged in hearing a case regarding the determination of the amount of compensation to be paid for an acquisition. One of the three members of the Tribunal was absent on one day, on which three witnesses were examined. On a subsequent day all the members were present and the case was argued and a judgment was given in which all the three members concurred:

*Held*, that owing to the absence of one of the members on a date when evidence was heard the Tribunal had no jurisdiction to give the judgment and it must be set aside. Section 59(6) of the U. P. Town Improvement Act shows that the Act contemplates that when one member is temporarily absent another member must be appointed in his place and it is not possible for the Tribunal to proceed in the absence of a member. Section 64(1)(b) empowers the President of the Tribunal to give a decision alone in certain matters, but the

\*First Appeal No. 41 of 1933, from a decree of the Tribunal, Improvement Trust, Allahabad, dated the 11th of September, 1932.



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determination of the amount of compensation is not one of such matters.

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There being want of jurisdiction, and not merely a substantial error or defect in the procedure, it was immaterial whether it could or could not be shown from the record that a material error had arisen in the judgment owing to the absence of one of the members on a date on which the three witnesses had been examined.

The Government Advocate (Mr. *Muhammad Ismail*), for the appellant.

Dr. *K. N. Katju* and Messrs. *Mansur Alam*, *Zamir-ul Haq* and *Mahboob Alam*, for the respondents.

BENNET and HARRIES, JJ.:—This is a first appeal by the Secretary of State for India in Council against a decree of the Allahabad Improvement Trust Tribunal. The Tribunal had an application before them against the award of the then acquisition officer for compensation for certain premises. The amount of compensation was increased by the Tribunal by Rs.4,600. The objection which has been taken is that the Tribunal was not properly constituted during the course of the trial of the case and therefore its award was without jurisdiction. The order sheet for the 25th August, 1932, one of the dates of the hearing, states that two members of the Tribunal, out of three, were present and one member Hafiz Ghazanfar-ullah was absent on that date. The Government Pleader took an objection that the case should not be taken up as one of the assessors was absent. The two members present, however, decided to proceed with the hearing of witnesses and on that date three witnesses were heard, one on behalf of the plaintiff and two on behalf of the defendant. On a later date the three members of the Tribunal were present and the case was argued and a judgment was given in which the three members of the Tribunal agreed. The point before us is whether the trial was one within the jurisdiction of the court below when the court acted contrary to the provisions of the Act on a certain date. The provisions of the U. P. Town Improvement Act, Act VIII of 1919, are particularly clear on the point. For a

compulsory acquisition there are several sections beginning with section 56. In section 57 it is provided that "A Tribunal shall be constituted, as provided in section 59, for the purpose of performing the functions of the court in reference to the acquisition of land for the Trust, under the Land Acquisition Act, 1894." In section 59 it is laid down that the Tribunal shall consist of a President and two assessors. In sub-section (6) it is provided: "When any person ceases for any reason to be a member of the Tribunal, or when any member is temporarily absent in consequence of illness or any unavoidable cause, the authority which appointed him shall forthwith appoint a fit person to be a member in his place." Therefore the Act contemplates that when one member becomes unavoidably absent another member must be appointed in his place, and it is not possible for the Tribunal to proceed in the absence of a member. In section 64 there is a provision in sub-section (1)(b) for the President of the Tribunal to give a decision alone. But this is merely in certain matters—the determination of the persons to whom compensation is payable and the apportionment of compensation between those persons. It is not possible for the President to act alone for the purpose of determining the amount of compensation to be paid for acquisition. Reference has been made to Act III of 1920 by which the U. P. Town Improvement Act of 1919 is modified, and it provides for an appeal on the ground of a substantial error or defect in the procedure provided by the Act which might possibly have produced error or defect in the decision of the case upon the merits. We do not consider however that the present case is one which merely amounts to a substantial error or defect in the procedure. On the contrary we consider that the question is whether the Tribunal had jurisdiction at all and if the Tribunal had no jurisdiction the appeal would lie under section 3(2)(i), the decision being contrary to law.

Reference has been made by learned advocate to certain rulings. In *Rohilkhand and Kumaon Bank v.*

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*Row* (1) there was a reference at page 474 as follows: "In the case of *Khelut Chunder Ghose v. Tara Churn Koondoo* (2) PEACOCK, C.J., made observations which apply in principle to the question before us: 'I apprehend that all acts of a judicial nature to be performed by several persons ought to be performed when they are all present together, and that a final decision ought not to be pronounced in a case in which they differ, until by conference and discussion of the points in difference they have endeavoured to arrive at a unanimous judgment.'" In *Nand Ram v. Fakir Chand* (3) at page 528 there was a reference to the ruling in *Rohilkhand and Kumaon Bank v. Row* (1) and it was also stated: "What the parties to a reference to arbitration intended is that the persons to whom the reference is made should meet and discuss together all the matters referred, and that the award should be the result of their united deliberations." In *Thammiraju v. Bapiraju* (4) there was a case where a suit was referred to arbitration and objection was taken to the award on the ground that one of the arbitrators had not attended the meeting when witnesses were examined by the other arbitrator and it was held that the award was invalid by reason of misconduct on the part of the arbitrators within the meaning of section 521(a) of the Civil Procedure Code.

On behalf of the respondents Dr. *Katju* argued that it could not be shown from the record that any material error arose in the judgment owing to the absence of one of the assessors on the date when the evidence of these three witnesses was recorded. We consider however that the question is not one which might arise under section 167 of the Evidence Act as to the improper admission or rejection of evidence and whether independently of that evidence there was sufficient evidence for the decision at which the Tribunal arrived. In our opinion the matter goes much deeper and it is a question of

(1) (1884) I.L.R., 6 All., 468.

(3) (1885) I.L.R., 7 All., 523.

(2) (1866) 6 W.R., 269.

(4) (1888) I.L.R., 12 Mad., 113.

whether the Tribunal had or had not jurisdiction. We consider that owing to the absence of one of the assessors on a date when evidence was heard the Tribunal ceased to have jurisdiction and therefore the decree passed by the Tribunal must be set aside. We accordingly set aside the decree of the Tribunal and we remand this application to the Tribunal for disposal according to law.

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### SPECIAL BENCH

*Before Mr. Justice Niamat-ullah, Mr. Justice Harries  
and Mr. Justice Rachhpal Singh*

#### REFERENCE UNDER THE STAMP ACT\*

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April, 28

*Stamp Act (II of 1899), sections 2(5) and 6; schedule I, articles 5 exemption (a), 15, 41, 43—Bond—Mortgage of crops—Agreement—Agreement for sale of goods or merchandise exclusively.*

(1) Where a document, attested by witnesses, was executed, mortgaging the standing sugarcane crop and the next year's crop on the executant's fields against an advance received from the mortgagee, and also stipulating to supply the said crop exclusively to the mortgagee at a certain rate:

*Held* that the document was, firstly, a mortgage of crops, falling under article 41 of schedule I of the Stamp Act; and, secondly, it was a bond as defined in section 2(5)(c) of the Act as it contained a specific stipulation, which was over and above the transaction of mortgage and not a necessary or integral part thereof, by which the executant undertook to deliver the sugarcane crop to the other party exclusively, and therefore falling under article 15 of schedule I of the Act. As the document filled this dual character, the higher of the two stamp duties was payable, in accordance with section 6 of the Act.

This document did not come within exemption (a) under article 5; for the document, taken as a whole, could not be considered to be a mere agreement, as an interest in property was created thereby and it was a mortgage and not merely an agreement. Apart from this, the exemption did not apply for the reason that the document was not "exclusively" an agreement for the sale of goods or merchandise, in view of

\*Miscellaneous Case No. 34 of 1936.

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the fact that it was also a combination of a mortgage of crops and a bond.

(2) Where a document was a simple agreement to sell sugarcane crop, and it set forth that the vendors had received an advance from the purchasers which would be set off against the price of the crop supplied, and there was no hypothecation of any crops, and although there were several subsidiary covenants the document evidenced only one transaction of sale and no other independent transaction:

*Held* that the document was an agreement for or relating to the sale of goods or merchandise exclusively and came under exemption (a) in article 5 of schedule I of the Stamp Act.

(3) Where a document, attested by witnesses, was in substance an agreement for supply of sugarcane by the executant to the other party, to be paid for at certain rates, and no advance had been made nor was any hypothecation created of existing or future crops:

*Held* that the document was not a bond but an agreement for or relating to the sale of goods or merchandise exclusively and came under exemption (a) of article 5. Even if it was assumed that the document filled a dual character and could be regarded both as such an agreement and as a bond, article 15 would not apply as article 5 specifically provided for such an agreement and therefore excluded the operation of article 15.

The definition of a bond given in section 2(5)(c) clearly contemplates cases in which the agreement is merely to deliver grain or other agricultural produce, which is the principal if not the sole obligation incurred under the agreement. Where, however, delivery of grain or other agricultural produce is incidental or merely ancillary to the obligation to sell grain or other agricultural produce, such agreement is not a mere bond but an agreement to sell goods, and the case falls not under article 15 but under article 5 so as to attract the application of exemption (a).

The Government Advocate (Mr. *Muhammad Ismail*), for the Crown.

Mr. *Shib Charan Lal*, for the opposite parties.

NIAMAT-ULLAH, HARRIES and RACHHPAL SINGH, JJ.:— This is a reference under section 57 of the Stamp Act (Act II of 1899) by the Board of Revenue for decision by this Court of the question whether a certain document is a "bond" within the meaning of clause (c) of sub-

section (5) of section 2 of the Stamp Act, chargeable under article 15, or a mortgage of crops chargeable under article 41, or a simple agreement for sale of goods and merchandise within the purview of exemption (a) to article 5 of the Stamp Act.

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The instrument in question was executed by one Thakuri Singh in favour of a firm styled Messrs. Kila Chand Deva Chand & Company of Bombay, proprietors of Kesar Sugar Works, Baheri. The latter had advanced to the executant of the instrument a sum of Rs.40, apparently, some time before the execution of the document. The first stipulation contained in the document expressly mortgages certain sugarcane crop belonging to the executant and standing in certain fields mentioned in the document. The deed proceeds to lay down that the executant would supply the aforesaid sugarcane crop exclusively to Kesar Sugar Works at a certain rate. Then follow a number of covenants incidental to the supply of the sugarcane crop as agreed. One of the covenants is: "That the amount remaining due after supplying the whole of the sugarcane crop will bear interest at the rate of twelve annas per mensem from the date of this document to the date of repayment, and the next harvest of sugarcane belonging to any of my fields in the village will remain mortgaged and will not be transferred to anyone else, unless the whole of the amount including interest is repaid out of the price of sugarcane." There are some other stipulations as regards the time of payment, etc.

"Mortgage deed" is defined in section 2(17) so as to "include every instrument whereby, for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers, or creates, to, or in favour of, another, a right over or in respect of specified property." Article 41 makes specific provision for stamp duty on mortgages of crops. If there had been no other complication and the instrument had evidenced a transaction whereby the executant hypothecated his sugarcane



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crop to secure the payment of the sum advanced to him, there could be no question as regards the nature of the instrument. It would have been a mortgage deed in respect of a crop, as provided by article 41. As already indicated, however, the deed contains a specific stipulation by which the executant undertakes to supply the sugarcane crop therein referred to exclusively to Kesar Sugar Works. Such a stipulation is not an integral part of the transaction of mortgage embodied in the deed. That is to say, if this stipulation had found no place in the instrument, it would nevertheless have been a mortgage deed. This aspect of the case is, to our minds, very material, in view of the definition of "bond" in section 2(5) of the Stamp Act. Therein "bond" is so defined as to include among others "any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another".

The instrument in question in this case is attested in the manner mentioned in section 2(5) of the Stamp Act. It is, therefore, clear that the particular covenant by which the executant agrees to deliver his sugarcane crop to Kesar Sugar Works is a bond, as defined in section 2(5) of the Stamp Act, and is chargeable as such under article 15. This characteristic of the instrument is wholly apart and separable from its characteristics as a mortgage. As already stated, if this covenant is deleted from the instrument its character as a mortgage deed will remain unaffected. In this view, it is clear to us that the instrument in question fills the dual character of a mortgage and a bond, as defined in section 2(17) and 2(5), respectively, of the Stamp Act. The necessary result of this view is that section 6 of the Stamp Act becomes applicable to an instrument of this kind, and the highest of the two duties provided for by the Stamp Act is payable.

The view taken by us is in accord with what was held by a majority of a Full Bench of five Judges in the case, *In the matter of Gajraj Singh* (1). In that case, as in

(1) (1884) I.L.R., 9 All. 585.

the present, the document contained a stipulation binding the executant to deliver his sugarcane crop to the obligee under the deed. There also the sugarcane crop had been hypothecated as security for payment of money advanced by the obligee. It was held by three learned Judges that the instrument filled the dual character of a mortgage deed and a bond. It is true that no specific provision existed in the Stamp Act, which was then in force, as regards the mortgage of crops. Article 41, as it now exists, has since been introduced; but it seems to us that this will make no difference so far as the present reference is concerned. The definitions of "bond" and "mortgage deed" are substantially the same in Act II of 1899 (the present Act) as in Act I of 1879, which was in force when the Full Bench decided the case noted above. It was in view of the two definitions that the Full Bench arrived at the conclusion that the instrument before them was of a dual character. The same considerations have influenced our view. For these reasons, we think that the aforesaid ruling fully covers the present case.

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We have considered the language of exemption (a) under article 5, which exempts from duty an "agreement or memorandum of agreement for or relating to the sale of goods or merchandise exclusively, not being a "note" or "memorandum" chargeable under No. 43." It is clear that the document, taken as a whole, cannot possibly be considered to be a mere agreement. All mortgages must be agreements first and mortgages afterwards. To this extent the deed in question is an agreement; but as an interest in property is created by the document, it is a mortgage and not merely an agreement. Similarly, the stipulation which, as held by us, amounts to a "bond" may be considered to be an agreement in so far as the executant agrees to do something; but falling as it does within the definition of a bond, it is something more. Apart from this, we do not think that the exemption already referred to applies to this case for the important reason that it is not "exclusively" an agreement for or



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relating to the sale of goods or merchandise in view of our finding that it is also a combination of a mortgage of crops and a bond.

The result is that we answer the reference as regards document No. 1, mentioned in the reference by the Board of Revenue, in terms of this order.

By the same reference we are required to determine the character of the following instrument: [Only the material portions are given below.]

"(1) We vendors shall by our own management, superintendence and cartage supply at least 800 maunds pukhta of Coimbatore sugarcane crop of 1342 F., cultivated by ourselves in the aforesaid village. . . .

"(2) We vendors shall daily supply the quantity of sugarcane as fixed by the purchasers. . . .

"(4) The vendors must supply 800 maunds of sugarcane within the time fixed in accordance with the daily allotment. If the quantity supplied be less, or nil, they agree to pay Rs.5 per cent. as costs and profits on the quantity, by which the quantity supplied is short of the stipulated quantity.

"(5) We vendors have received Rs.195 as advance from the purchasers. This amount will be set off towards the price of sugarcane. . . .

"(6) We vendors shall deposit Rs.5 per cent. of the price of sugarcane supplied with the purchasers as security money, and this will be credited to our account at the time of accounting at the end of the stipulated period. Should the contract remain incomplete, the purchasers would be entitled to deduct from the security money such penalty which may accrue due to the purchasers on account of short supply of sugarcane.

"(7) Should any sum remain due from the vendors at the end of the supply of sugarcane, the vendors shall be liable to pay the sum with 1 per cent. interest per month from today, but if any money is found due to the vendors the sum shall be payable without any interest.

"(8) Should the vendors not supply the sugarcane or make 'Kand Siah' or sell it elsewhere, they shall be liable to pay back the above amount with 50 per cent. as interest from their person and all property."

The instrument is not attested. The Board of Revenue are inclined to think that it evidences a mortgage. We have considered all the clauses occurring in

the deed, and are unable to find any hypothecation of the sugarcane crop then standing or to be grown subsequently. To our minds the instrument is a simple agreement to sell sugarcane crop. The promisor undertook to supply 800 maunds of Coimbatore sugarcane crop. The various clauses which follow the principal agreement contained in the first clause are subsidiary covenants and do not take the transaction out of the category of an agreement to sell sugarcane crop. The fact that the promisor agreed to leave 5 per cent. of the price in the hands of the vendee as security does not amount to anything more than an incidental covenant occurring in an agreement to sell a certain commodity. The seventh clause merely contemplates the liability of the promisor to refund the whole or part of Rs.195 received by him in anticipation of the supply of sugarcane to which the agreement relates. The eighth and last clause is merely consequential on the promisor being guilty of the breach of his undertaking.

The learned Government Advocate has strenuously contended that the instrument in question is not "an agreement for or relating to the sale of goods or merchandise exclusively" as contemplated by article 5, exemption (a), schedule I, of the Stamp Act. His contention is that in so far as the instrument contains many collateral stipulations besides the agreement to sell sugarcane crop, it cannot be considered to be one for sale of goods or merchandise exclusively. It has not been contended before us that if the aforesaid exemption is otherwise applicable, it does not apply because sugarcane crop is not "goods or merchandise" within the meaning of exemption (a) of article 5. As to whether the agreement is one for or relating to the sale of goods or merchandise *exclusively*, we think that the instrument embodies only one agreement with several subsidiary covenants which do not detract from its exclusive character. Our view finds support from *Kyd v. Mahomed* (1), in which MUTUSAMI AYYAR and PARKER, JJ., observed: "The test

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(1) (1891) I.L.R., 15 Mad., 150.

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which should be applied is to see whether the document evidences only a transaction of sale or a sale and some other independent transaction, and if the former, the number of subsidiary stipulations it may contain cannot alter the nature of the transaction." As we have already said, the principal agreement embodied in the document is one for sale of sugarcane crop, and all the other covenants which follow are of a subsidiary or auxiliary nature, and none of them is independent of the main agreement which it was the object of the parties to reduce into writing. Accordingly we answer the reference as regards this document as above.

There is yet a third instrument which is the subject of the reference before us. The principal covenant therein contained runs as follows: "I covenant that I shall be bound to supply 250 maunds of sugarcane to the factory at the rate prescribed by the Government for each maund. I shall supply the Coimbatore sugarcanes to the creditors . . . for manufacture of sugar by the factory, i.e., by the Kesar Sugar Works, Baheri, at the Ramnagar station or at the factory aforesaid, according to the instructions of the creditors aforesaid. The entire costs of supply of the sugarcane shall be borne by me, and the creditor aforesaid shall have nothing to do therewith."

The obligee under the deed has been referred to as the creditor, but as a matter of fact no money was advanced to the executant of the agreement. The instrument was drawn up on a printed form, some paragraphs of which contemplate an advance by the obligee. In this case, as nothing was paid to the executant, the places reserved for the amount advanced and connected matters have been left blank. In substance the agreement is for supply of 250 maunds of sugarcane to the factory belonging to the obligee, to be paid for at the rates which the Government would fix from time to time.

There is nothing in the document which creates any hypothecation of existing or future sugarcane crop to secure the payment of any money due or to become due

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from the executant. In this view there can be no doubt that this deed is not a mortgage deed.

The learned Government Advocate contends that this instrument is a bond as defined by section 2(5) of the Stamp Act. He relies upon clause (c) of the definition, under which "bond" includes "any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another". If the instrument in question is a bond, as is contended by the learned Government Advocate, the duty payable thereon is in terms of article 15 of schedule I, Stamp Act.

Article 5 of the same schedule relates to an agreement or memorandum of an agreement, for which a specified duty is chargeable. There are, however, three exemptions, the first of which, namely (a), should be taken into consideration in determining the duty payable in respect of the agreement. That exemption includes "Agreement or memorandum of agreement for or relating to the sale of goods or merchandise exclusively. . . ." If the instrument before us be construed to be an agreement for or relating to the sale of goods or merchandise exclusively, and not a bond, it is exempt from stamp duty. It is said that in so far as the agreement contains a stipulation whereby the executant obliges himself to deliver sugarcane which is an agricultural produce, the instrument is a bond for which duty should be paid under article 15. We think, in the first place, that an agreement to deliver grain or agricultural produce where delivery is an essential element of the sale of goods or merchandise cannot be said to be a bond. The definition of that term given in section 2(5) clearly contemplates cases in which the agreement is merely to deliver grain or other agricultural produce, which is the principal if not the sole obligation incurred under the agreement. Where, however, delivery of grain or other agricultural produce is incidental or merely ancillary to the obligation to sell grain or other agricultural produce, such agreement is not a mere bond but an agreement to sell goods and the case falls not under

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article 15 but under article 5 so as to attract the application of exemption (a).

Another ground for treating the instrument in question as an agreement for or relating to the sale of goods or merchandise exclusively, as contemplated by article 5, exemption (a), is that article 15 which provides for duty payable in respect of bonds applies only where the instrument is not otherwise provided for. If it be conceded that the instrument is an agreement for or relating to sale of merchandise or goods exclusively, even though it may also fall within the category of bonds, article 15 does not apply as article 5 expressly provides for an instrument of this kind. It seems to us that article 15 is a residuary article applying only to such bonds as are not separately provided for in other articles.

For the reasons stated above we hold firstly that the third instrument is an agreement for or relating to the sale of goods or merchandise exclusively and is not a bond and secondly, assuming that it fills a dual character and can be regarded both as a bond and an agreement for or relating to the sale of goods or merchandise exclusively, article 15 does not apply as *ex hypothesi* it can apply only if such an agreement is not specifically provided for and that as article 5 expressly deals with agreements of this description the operation of article 15 is excluded.

Our reply to the reference as regards instrument No. 3 is as indicated above.

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<b>ABADI</b> —Co-sharer zamindar's house in abadi—Co-sharer's share in zamindari sold by auction—Position qua house—Ownership of materials, right of residence and right of transfer of house not affected.] When a co-sharer zamindar, who owns a house in the village, loses his share in the zamindari by auction sale and becomes an ex-proprietary tenant, he loses his joint right in the site of the house but does not lose his proprietary right in the materials of the house nor his right of residence in it, nor his right of transfer of the house. A transfer of the house by him conveys a full title in the materials of the house and in the right of residence therein.	
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<b>AGRA PRE-EMPTION ACT</b> (LOCAL ACT XI OF 1922), SECTIONS 3 (PROVISO) AND 16—Partial pre-emption—Houses and share of zamindari sold together—Pre-emptor who has disqualified himself from pre-empting the houses can pre-empt the zamindari alone—Pre-emption of houses is not a pre-emption under the Act—Agra Pre-emption Act, section 4(3)—"Land" whether includes houses.] A share in three villages, as also a share in two houses situate in one of the villages, were sold together by one sale deed. A suit for pre-emption was brought in respect of the entire property sold; but it was found that the plaintiff had, prior to the suit, gifted away her share in the houses and, moreover, had failed to make the necessary demands under the Muhammadan law, and that in respect of two of the villages the vendee stood on an equal footing with the plaintiff: <i>Held</i> that the plaintiff was entitled to pre-empt the share of the third village, upon payment of a proportionate share of the sale price.	
According to section 16 of the Agra Pre-emption Act a pre-emptor is bound to enforce his right of pre-emption in respect of the whole of the property which he is entitled to pre-empt	



under that Act. The section is comprehensive and contains the whole rule regarding partial pre-emption, and it is not necessary for the pre-emptor to include in his claim such portions of the property sold as he may be entitled to pre-empt under the Muhammadan law or any other law or custom outside the Agra Pre-emption Act. All that is necessary is that he must bring his suit for pre-emption in respect of the whole of the property which he may be entitled to pre-empt under the Agra Pre-emption Act; and if there are any items of the property sold which he is not entitled to pre-empt under that Act, then neither the omission to claim to pre-empt them nor his having disqualified himself from pre-empting them is fatal to his claim as regards the property pre-emptible under the Act.

The fact that section 3, proviso. of the Agra Pre-emption Act refers to the Muhammadan law of pre-emption does not make a right to pre-empt a house under the Muhammadan law a right of pre-emption to which the plaintiff is entitled under the Agra Pre-emption Act; when such a right is enforced, it is not enforced under the Act but under the Muhammadan law.

Where a person is the owner of a house and also of a half share in the site on which it stands, it can not be said that the house should be considered to be attached to the half share in the site, and the house does not come within the definition of the word "land" in section 4(3) of the Agra Pre-emption Act.

Zainab Bibi v. Umar Hayat Khan, I. L. R., 58 All. 873

AGRA PRE-EMPTION ACT (LOCAL ACT XI OF 1922), SECTION 4(3)—  
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AGRA PRE-EMPTION ACT (LOCAL ACT XI OF 1922), SECTION 19, PROVISOR—  
*Vendee becoming co-sharer after suit and before decree—  
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Act (Local Act IX of 1929), section 3—Retrospective effect—  
Interpretation of statutes—Question of substantive right or of  
procedure.]* During the pendency of a suit to pre-empt a sale to a stranger, the defendant vendee became, by virtue of a deed of gift in his favour, a co-sharer of equal status with the plaintiff. Shortly afterwards the Agra Pre-emption (Amendment) Act (IX of 1929) came into effect, which added the proviso to section 19 of the Agra Pre-emption Act, 1922. Later on, the suit was decreed by the trial court:

*Held* by the Full Bench (NIAMAT-ULLAH, J., dissenting) that the proviso added to section 19 of the Agra Pre-emption Act by the Amending Act of 1929, which came into force after the deed of gift in favour of the defendant vendee, did not prevent him from defeating the plaintiff's claim by virtue of having obtained that deed of gift prior to the passing of the decree.

The proviso is in the nature of an exception to the general rule which was well established when the Amending Act was passed, and should not, in the absence of any indication in the Act that it was intended to have a retrospective effect, be so construed as to affect retrospectively transactions which had come into existence, or rights which had become vested or had been extinguished, before the passing of that Act.

The right of pre-emption is a right of substitution, a right of preference, and as soon as the position of both parties becomes equal in status the preference disappears and the right of pre-emption is altogether extinguished. Once the plaintiff's right was extinguished upon the defendant's acquisition of the status of a co-sharer by virtue of the deed of gift, it could not be revived by the subsequent passing of the Amendment Act in question. The right of the defendant vendee, who has acquired equal status by a deed of gift, to defeat the plaintiff's

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right of pre-emption is a substantive right, and not a mere matter of procedure which can be regarded as a plea in defence like the plea of limitation; this substantive right, which vested in him as the result of the deed of gift, could not be affected by the subsequent Act.

It is a well established rule of construction that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards a matter of procedure, unless that effect can not be avoided without doing violence to the language of the enactment. If the new Act touches a right in existence at the passing of the Act, then it should not be held to be applicable to a pending action concerning that right.

[*Per NIAMAT-ULLAH, J.*—There is nothing in the Agra Pre-emption Act which lays down that the pre-emptor's right ceases to exist on the vendee acquiring an equal status during the pendency of the suit; on the contrary there are clear indications, e.g. sections 10, 11 and 20, which show otherwise. The law makes a clear distinction between the extinguishment of a right and a bar to the exercise of it. Section 20 clearly recognizes the existence of the right which accrued under section 11, but bars the enforcement thereof where the vendee acquires an equal right before the suit; similarly, under section 19 the right of pre-emption is not extinguished by the vendee acquiring an equal right after the institution of the suit, only the exercise of the right is barred.

[If section 19 and its proviso are read together, as they must and not the proviso by itself, it appears that the crucial date is the date of the decree; and as the Amending Act had come into force before the decree came to be passed, the section with the proviso appended must be applied in the present case. The section as a whole is a direction to the court; and if the court finds, when it proposes to pass a decree, that there is a certain rule of law laid down for its guidance, it must give effect to it in passing its decree. No retrospective effect is implied in the court doing so; had the Amending Act come into force after the first court had passed its decree, and the proviso was sought to be applied at the stage of the appeal, it would be a question of giving retrospective effect.

[Section 19 is so worded as to make the rule therein contained a rule of procedure rather than a rule of substantive law; it does not create any right nor does it extinguish any right. It is a well settled rule of construction that an enactment which provides procedure applies to suits pending at its date.]

Haidar Husain v. Puran Mal, I. L. R., 58 All. ... 63

AGRA PRE-EMPTION (AMENDMENT) ACT (LOCAL ACT IX OF 1929), SECTION 3—Whether retrospective effect ... 63

AGRA TENANCY ACT (LOCAL ACT II OF 1901), SECTION 22—*N.-W. P. Rent Act (XII of 1881), section 9—Occupancy tenant—Succession—Hindu widow succeeding to occupancy tenant before the Act of 1901—Succession to such widow on her death after the coming into force of that Act.*] Section 22 of the Agra Tenancy Act, 1901, was not intended to apply at all to the case of a Hindu widow who had, prior to the coming into effect of that Act, and in accordance with section 9 of the N.-W. P. Rent Act XII of 1881, succeeded to the estate of a Hindu widow in the occupancy tenancy of her husband; and upon the death of such widow, her heir was to be ascertained with reference to the Hindu law and not to the Tenancy Act of 1901. So, where an occupancy tenant died while the Act of 1881 was in



force and his widow succeeded him, and the widow died while the Act of 1901 was in force, it was *held* that the daughter was entitled to succeed.

Ajodhya Pande v. Rajna, I. L. R., 58 All. ... 139.

AGRA TENANCY ACT (LOCAL ACT III OF 1926), SECTIONS 8, 73, 219—*Thekadar—Covenant against reduction of rent upon remission of revenue—Validity.*] A theka granted by a zamindar contained a covenant that the amount fixed as the rent to be paid by the thekadar would not be reduced or affected in any way on account of any remission or suspension of revenue or rent which might be made by the Government:

*Held* that the covenant was valid and was not overridden by section 8(1) of the Agra Tenancy Act, inasmuch as the word "tenant" in that section did not include a thekadar; there was no express provision in section 8 for the inclusion of a thekadar, as required by section 3(6), nor was section 8 one of the five sections mentioned in section 219 as being applicable to thekaders. Accordingly the covenant would override the provisions of section 73, under clause (3) of which a thekadar would be entitled to the benefit of an order of remission or suspension of his rent, passed in consequence of the remission or suspension of revenue.

Makhan Lal v. Mufti Tawassul Husain, I. L. R., 58 All. 998.

AGRA TENANCY ACT (LOCAL ACT III OF 1926), SECTIONS 24, 25—*Occupancy tenant—Succession—Hindu widow succeeding to tenancy during Tenancy Act II of 1901—Widow dying after present Act came into force—Interpretation of statutes—Intention, assumption of continuity—Practice and pleading—New plea in second appeal—Agra Tenancy Act, section 273—Scope of court in deciding issue referred.*] *Held* (per SULAIMAN, C.J., and BAJPAL, J.: BENNET, J., *contra*), that where a Hindu occupancy tenant died while the Tenancy Act II of 1901 was in force and was succeeded by his widow, and the widow died after the coming into force of the Tenancy Act III of 1926, the succession would be governed by sub-section (2), and not sub-section (1), of section 25 of the Tenancy Act III of 1926; and a person who was the nearest collateral male relative (in the male line of descent) of the last male occupancy tenant and who shared in his cultivation at his death would not be entitled to succeed, on the death of the widow, under section 24 of the Tenancy Act III of 1926 or otherwise.

Separate provisions for succession to male and to female tenants, which did not exist in the Tenancy Act II of 1901, have for the first time been made by sections 24 and 25 of the present Tenancy Act III of 1926. Section 25 deals with succession to female tenants, and the presumption is that the rules of succession laid down in it are intended to be exhaustive. Sub-section (1) of section 25 contains a group of specified classes of female tenants, and sub-section (2) is the residuary sub-section including all the rest, except female statutory tenants who are dealt with by sub-section (3). Sub-section (2) must, therefore, apply to a female occupancy tenant unless she can be brought within the purview of sub-section (1).

The phrase "under section 24" in the clause, "who has inherited an interest in a holding under section 24", in sub-section (1) of section 25 is an adverbial phrase modifying the verb "has inherited"; the clause, therefore, refers to a female tenant who inherits under section 24 of the present Act, i.e. after the coming into force of that Act. Further, the verb "dies", which has been used in all the three sub-sections of section 25, cannot and should not be construed to mean "had died before the Act came into force". A widow who inherited an occupancy tenancy before the coming into force of the

present Act could not, therefore, come within sub-section (1) of section 25, and therefore sub-section (2) must necessarily apply to her; accordingly on the death of such widow the collateral heirs of her deceased husband are altogether excluded.

Even if the phrase be taken to be an adjectival phrase it would qualify the noun "interest" and the meaning would be an interest acquired under section 24. The meaning of the clause could not be "an interest referred to or recognized in section 24", unless new words were interpolated in the section, and for this there was no justification. The section must be interpreted as it stands, by giving the words their natural meaning, and without putting a constrained interpretation on them on the assumption that the legislature intended to leave the matter of inheritance to a widow untouched and exactly as it was under the previous Tenancy Act. A purely arbitrary rule of succession to tenancies was introduced into the previous Tenancy Act; extensive changes have been made therein in many respects in the present Tenancy Act, and the present rule of succession is also purely arbitrary; there is no reason to imagine that the legislature must have intended that in the matter of succession to a widow there should be no change. In these circumstances the natural meaning of the words must prevail, whatever may be the general considerations as to what the legislature was minded or was likely to do.

There is no ground for thinking that the legislature has classified female tenants into two groups, namely those who have limited interest and those who have full interest; no such classification is to be found in section 25.

A female heir of an occupancy tenant is herself an occupancy tenant, just as much as a female who herself, for the first time, acquires an occupancy tenure.

Where a suit for ejectment was brought by a zamindar against a person in possession of an occupancy holding who was alleged not to have heritable rights to it upon the death of the last holder, a widow, and there was an admission by the defendant of the plaintiff's allegation that the widow had inherited the holding from her husband who had been the occupancy tenant, and the plea of the defendant amounted to a claim to succeed on the ground of being the nearest collateral who had shared in the cultivation of the husband, and there was no proper plea regarding any claim to succeed on the ground of having been a co-tenant and joint owner with the husband:

*Held*, further, with reference to the pleadings in the case, that it was not open to the defendant, in second appeal, to have the case sent back for a finding upon such a claim, nor was it open to the revenue court, in deciding an issue on the plea of tenancy referred to it under section 273 of the Tenancy Act, to come to a finding of joint ownership in favour of the defendant, as no such plea had been taken by the defendant.

[*Per* BENNET, J.:—The word "dies" in section 24 of the Tenancy Act III of 1926 is used in a perfectly general sense and is not limited to death occurring after that Act came into force. The section means that the order of succession laid down therein is to apply whenever the question arises during the time that the Act is in force, independently of the time of death. This section alone is sufficient to govern the succession to the male occupancy tenant, and to his widow after her death or re-marriage. Where a widow succeeds to an occupancy tenancy she gets the same kind of interest, namely "till her death or re-marriage", whether the succession be under section 22 of the Tenancy Act II of 1901 or section 24 of the Tenancy Act III of 1926. A widow who succeeded "till death or re-marriage" under Act II of 1901 continues with such interest, so limited, under Act III of 1926. If the widow dies while

Act II of 1901 is in force, then on her death the succession goes to the classes mentioned below her in section 22 of the Act; similarly, if she dies while Act III of 1926 is in force, then on her death the succession goes to the classes below class II mentioned in that Act.

[Section 25(2) of the present Act is intended to provide for the succession to female tenants who had themselves acquired the tenancy, e.g. rights of occupancy by 12 years' cultivation. To distinguish their case provision was made in section 25(1) for female tenants who inherited an interest in a holding from male tenants, and reference was made to section 24. Upon a correct interpretation of the language of section 25(1), it is not confined only to a female who has inherited since the present Act came into force. The phrase "under section 24" does not modify the word "inherited"; and the meaning of the clause is "an interest which can be held under section 24", and one of the interests recognized by section 24 is that of the "widow till her death or re-marriage".

[Sub-sections (1) and (2) of section 25 mean to distinguish two classes of female tenants, (a) those who have taken by succession to males and who have only a limited interest and from whom as a stock the holding does not devolve, and (b) those who themselves acquired occupancy rights and from whom the holding does devolve.

[The pleadings in the written statement could be fairly taken to include a plea of co-tenancy and joint ownership. The revenue court was entitled to come to a finding of co-tenancy in favour of the defendant, on the pleadings, and on the issue referred to it. If the defendant was a co-tenant he would succeed under section 26 of the present Act.]

Piare Lal v. Soney Lal, I. L. R., 58 All. ... 413

AGRA TENANCY ACT (LOCAL ACT III OF 1926), SECTION 221—  
Lambardar's decree against co-sharer for share of revenue—  
No rights of priority accrue upon sale in execution thereof, on  
the ground that revenue is the first charge on land, *See* Land  
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AGRA TENANCY ACT (LOCAL ACT III OF 1926), SECTION 230—*Theka of agricultural lands and some shops for an entire sum of annual rent—Suit for arrears of rent—Jurisdiction—Civil and revenue courts.* A suit for arrears of rent due on a joint theka of agricultural lands as well as some shops, the rent being fixed as one entire sum without any apportionment, is cognizable by the civil court. Such a suit is not one of the suits specified in the fourth schedule to the Agra Tenancy Act, and the revenue court can not entertain it and can not give adequate relief to the parties. The suit, therefore, is not excepted from the cognizance of the civil court by the provisions of section 230 of the Agra Tenancy Act. Further, as the rent was not apportioned, it was impossible for the plaintiff to split up his cause of action so as to file a suit in respect of the agricultural lands in the revenue court and another suit in respect of the shops in the civil court.

Dau Dayal v. Ram Prasad, I. L. R., 58 All. ... 1050

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AGRICULTURISTS' RELIEF ACT (LOCAL ACT XXVII OF 1934), SECTIONS 3, 5, 8, 12—*Conversion of preliminary decree on mortgage into instalment decree—Transferee of mortgagor is entitled to apply—Period of instalments—Date from which such period*

is to be reckoned.] A preliminary decree for sale on a mortgage was passed against a transferee of the property from the mortgagor. Subsequently, on the coming into force of the U. P. Agriculturists' Relief Act, he applied under section 5 of the Act for conversion of that decree into a decree for payment by instalments in accordance with section 3.

*Held*, that the fact that the loan was not advanced to him did not disentitle him to apply, if he established that the mortgagor was an agriculturist and that he himself was an agriculturist at the date of the loan as well as at the date of the suit, as laid down in section 8.

*Held*, also, that if the applicant was, as he claimed to be, an agriculturist coming under explanation VI to section 2(2), he would be an agriculturist for the purposes of chapter III; and as he was a person who would have been entitled to redeem the mortgage under section 12 which is in chapter III, he was an agriculturist to whom chapter III applied; and therefore, in accordance with section 3, the period of instalments could not extend beyond four years from the date of the decree.

*Held*, further, that for the purposes of section 5 the meaning of the word "decree" in the proviso to section 3(1) is the decree for instalments and not the original decree which is converted into a decree for instalments; therefore, the period of instalments is to be reckoned from the date of the instalment decree which is to be passed under chapter II.

Ram Ghulam v. Bandhu Singh, I. L. R., 58 All. ... 941

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BAR COUNCILS ACT (XXXVIII OF 1926), SECTION 10—Professional misconduct—Filing certificate of fees partly paid in cash and partly promised, *See* Advocate ... 307

BAR COUNCILS ACT (XXXVIII OF 1926), SECTIONS 12, 19(2)—*Rules made by High Court under section 12 of Bar Councils Act, rule 11—Bench of three Judges considering Bar Council Tribunal's finding—Opinion of majority to prevail and be valid—Letters Patent, clauses 8, 27, 35—Jurisdiction.* When findings of Bar Council Tribunals come up for consideration before a Bench of three Judges, in accordance with rule 11 of the rules framed by the High Court under section 12 of the Bar Councils Act, the opinion of the majority of the Judges prevails and is the valid judgment; unanimity of the Judges constituting the Bench is not necessary for the reversal of the finding of the Bar Council Tribunal.

Clause 8 of the Letters Patent confers jurisdiction on the High Court to remove or suspend advocates, whereas section 10 of the Bar Councils Act lays down the procedure according to which such jurisdiction should be exercised; the Bar Councils Act has not in itself conferred a jurisdiction on the High Court replacing the previous jurisdiction. As the jurisdiction to deal with advocates still vests in the High Court under clause 8 of the Letters Patent, and the High Court in exercising that jurisdiction is performing a function directed by the Letters Patent, its Benches are therefore governed by the rule as to the opinion of the majority mentioned in clause 27 of the Letters Patent. No doubt under clause 35 of the Letters Patent the provisions of the Letters Patent can be modified by subsequent enactments in India; but there is nothing in the Bar Councils Act or in any rules made thereunder which has expressly abrogated, or

has impliedly repealed by providing something inconsistent, the provisions of clause 27 that the opinion of the majority of the Judges hearing the case should prevail. Section 19(2) of the Bar Councils Act makes it clear that the Letters Patent shall be deemed to have been repealed only in so far as they are inconsistent with the Act or any rules made thereunder. Indeed the fact that the Act is silent, and so are the rules, on the point would suggest that this provision of the Letters Patent has necessarily been retained. The provisions of clause 27 relating to the powers of single Judges and Division Courts are of general application, and unless there is something in the Bar Councils Act—which there is not—which would curtail those powers, they must be considered to be still in force.

In the matter of an Advocate, I. L. R., 58 All. ...

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**BATHING GHAT—Dedication to public use without creating a trust—**

*Rights of dedicatior—Suit to eject squatters—Bathing ghat in Benares constructed and maintained by owner of the site for the public use—Ghatias occupying specific portions of ghat—Licensees—Prescriptive right—Customary right—Invasion of rights of the public.]* The plaintiff's predecessor purchased some land on the banks of the Ganges in Benares, built a masonry ghat thereon and dedicated it to the public use although no deed of endowment or trust had been executed. The public had been using the ghat for generations. The ghat was maintained and repaired by the plaintiff and her predecessors and they also had been realising toll from the stall keepers who sat on the ghat on festivals. The defendants were ghatias, who and whose predecessors had been occupying different portions of the ghat for generations, having put up *takhts* and canopies on poles let into holes on the pavement and stairs, leaving a width of about four feet only between the *takhts* for the bathers to pass down to the river; and they had been taking alms and gifts from the bathing public at the ghat, for assisting them in the performance of bathing and other religious rites. In a suit by the plaintiff against the defendants it was held that—

(1) As no trustee or manager had been appointed to look after the ghat on behalf of the public, the plaintiff as heir of the original donor was entitled to maintain the suit, the object of which was not to resume the grant but to effectuate the intention of the grantor by preserving the property to the uses for which it was dedicated to the public.

(2) The plaintiff was not entitled to a declaration of an absolute proprietary title in the ghat, as the same had been dedicated to the public, and the plaintiff had only the right of reversion if ever the ghat ceased to be used as such.

(3) The defendants were not entitled to exclusive possession over specific portions of the ghat and to place *takhts* and canopies over them by fixing poles in the pavement by digging holes in it. The right claimed by them was not capable of being acquired by prescription or under a lost grant inasmuch as the ghat having been dedicated to the public, the defendants could not have acquired any right under any grant or prescription which might interfere with or limit or obstruct the rights of the public. The putting up of *takhts*, canopies, etc. by way of exclusive possession was a serious interference with and restriction of the rights of the public who were entitled to the use of the whole of the ghat. Where land has been dedicated to the public, no one can by invasion, however prolonged, gain for himself a title to the land or to the exclusive user of the land. So far as a grant is concerned, in the case of property which has been dedicated no person can make a valid grant affecting or interfering with the rights of the public. Again,

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the right set up by the defendants could not be a customary right of the ghatias as a class, for then the claim of exclusive possession of the defendants would militate against the rights of the other ghatias; moreover, the evidence showed that the other ghatias occupying this ghat and other ghats did so by leave and license of the builders of the ghats, so that ghatias were only licensees.

(4) But although the defendants had no right of exclusive possession over any portion of the ghat or to put any *takhts*, canopies, etc. thereupon, they as members of the public had a right to enter upon the ghat and to use it; and the plaintiff had no right to interfere with the right of the public of being served by the ghatias or with the defendants' receiving alms or gifts for their services from the public. The plaintiff was not entitled to any decree of ejectment of the defendants from the ghat or to any injunction against them preventing them from acting as ghatias on the ghat.

Gauri Shankar v. Maharani Hemant Kumari, I. L. R.,  
58 All. ... 818

BENAMI TRANSACTION—*Fraudulent sale deed—Joint fraud—Fictitious sale for defeating right of pre-emption—Fraud accomplished—Subsequent suit on basis of fictitious deed—Parties in pari delicto—Defendant entitled to plead joint fraud and show the true character of the sale deed—Position of heirs of original parties.* *D*, the purchaser of certain property, was not a co-sharer in the mahal, and apprehending that a suit for pre-emption might be brought, executed a fictitious sale deed of the property in favour of *G*, who was a co-sharer; both parties knowingly joining together in the fraud. Possession of the property remained with *D*. A suit for pre-emption was actually brought but it was dismissed on the ground that the property had passed to a co-sharer; and the fraud was fully accomplished. Subsequently a suit for possession of the property was brought by *G*'s heir against *D* on the basis of the sale deed; and the principal question was whether *D*, being in *pari delicto* with *G*, was precluded from pleading the joint fraud and showing the true character of the fictitious transaction by which no title had passed.

*Held* that the defendant was not precluded from showing the true nature of the sale deed, involving the joint fraud of both the parties; the defendant was not relying upon the sale deed, nor seeking any relief; it was the plaintiff who was relying upon and seeking to enforce the deed, and in such cases the defendant was entitled to give evidence of the real nature and circumstances under which the document came into existence, including the particulars of a joint fraud of the parties which might be alleged by him.

Any person who comes to seek relief from a court of law should not be a party to a fraud, and if both parties are in *pari delicto* the court should decline to help either party who seeks relief and let things remain as they are and let the parties reap the consequences of their own fraud and dishonesty. The plaintiff sought to obtain relief from the court on the basis of the fraudulent transaction; and if the court were to decree his claim, it would not only be upholding the fraudulent sale deed as a valid document but would be carrying the fraud farther still by giving the plaintiff possession of the property which he had not obtained under that fraudulent transaction.

The present suit was brought, not by the original fictitious vendee himself, but by his heir; but there was no reason why the plaintiff, who was an heir and not a *bona fide* transferee for value, should be in any better position than the original



vendee himself and be given a decree which should have been refused to the latter.	Page
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CHILD MARRIAGE RESTRAINT ACT (XIX OF 1929), SECTIONS 5, 6— <i>What section applicable to the parents performing or conducting child marriage—Question of validity or of consummation of the marriage does not arise.</i> [A marriage between a girl of over 14 years of age and a boy of less than 18 years of age was performed and conducted by their respective fathers. Upon their prosecution under sections 5 and 6 of the Child Marriage Restraint Act, pleas were taken that there was no valid marriage at all as the parties belonged to the same <i>gotra</i> , that <i>gauna</i> ceremony had not been performed yet, and that the girl not being a “child” as defined in the Act, her father could not be convicted under the Act. <i>Held</i> —	
(1) That the marriage ceremony having been performed, no question of the validity or the invalidity of the marriage, or of the consummation or absence of consummation thereof, could arise under the Child Marriage Restraint Act; such questions were beyond the scope of that Act.	
(2) Section 5 of the Act deals with the persons who perform, conduct or direct any child marriage, and the conviction of the two fathers under that section was valid inasmuch as in the case of Hindu marriages the fathers do perform, conduct and direct the marriage ceremonies. The section is wide enough to cover the cases of the father of the bridegroom and that of the bride, and the fact that the bride was not a “child” does not affect the question of her father’s liability for the child marriage as it was he who gave his daughter in marriage and took part in the marriage ceremonies.	
(3) Section 6 of the Act provides for the offence in cases where a minor himself contracts a child marriage. The present case not being such a case, the convictions of the two fathers under that section were illegal.	
Emperor v. Munshi Ram, I. L. R., 58 All. ...	402

CIVIL PROCEDURE CODE, SECTION 11, EXPLANATION IV—*Constructive res judicata—Principle how far applicable to execution proceedings—Estoppel by conduct and surrounding circumstances—Civil Procedure Code, order XXI, rules 22, 23—Application for execution, alleging part payment within limitation—Judgment-debtor not appearing and pleading limitation—Order for arrest passed on application and arrest effected—Subsequent raising of plea of limitation.*] The first application for execution of a money decree was made more than three years after the date of the decree, with an allegation that a part payment had been made which saved limitation; this payment had, earlier, been certified to the court upon an application by the decree-holder *ex parte*. Notice of the application for execution was issued to the judgment-debtor under order XXI, rule 22; he, however, did not appear or raise any plea of limitation. The court recorded a note on the order sheet to the effect that the judgment-debtor was served with notice but had not filed any objection, therefore the application be considered to be within time and be entered in the register and be put up for orders. Thereafter an order was passed for the arrest of the judgment-debtor, as had been prayed for in the application for execution. He was arrested and produced in court, and he then filed an objection that he had not made any part payment and the application for execution was barred by time. The objection was rejected on the ground that it should have been taken earlier, and that having failed to take it at the proper time the judgment-debtor was debarred from taking it now. He was sent to the civil prison, but was released after a week, as subsistence money was not paid. After his release he again filed an objection on the ground of limitation, against execution proceedings on the application, but the objection was rejected on the same ground as before. Revisions were filed from these orders rejecting the objections:

*Held*, by the Full Bench, that the objection of the judgment-debtor, that the application which was in execution was barred by time, was maintainable.

It is the principle underlying section 11 of the Civil Procedure Code, which is a general principle of estoppel by judgment, which is applicable to execution proceedings; but it must be so applied within the limits prescribed for that principle when applied to suits, and can not be given a wider scope or a more extensive application.

[*Per* NIAMAT-ULLAH, J.:—In certain cases it is a question of difficulty how far the rule enacted in explanation IV to section 11 is an integral part of the general principle of *res judicata*. That principle can not apply unless the question, which explanation IV requires to be assumed to have been in issue though not raised, can be deemed to have been "heard and finally decided" and that depends upon the manner in which the proceedings terminated. If the ultimate result of the proceedings was such as to be accountable only on the hypothesis that the question was decided in the decree-holder's favour, it may be deemed not only to have been directly and substantially in issue, but also to have been finally decided.]

The following propositions of law were laid down:

(1) Where there has been an express adjudication by the court in the presence of parties, then the question must be considered to have been finally decided, no matter whether it is raised again at a subsequent stage of the same proceedings or in a subsequent execution proceeding.

(2) Where an objection is taken but is dismissed or struck off, even though not on the merits, and the application for execution becomes fructuous, the judgment-debtor is debarred from raising the question of the invalidity of that application.



(3) Where an objection to execution is taken, and it is not dismissed on the merits or is dismissed for default, and the application for execution does not become fructuous, the judgment-debtor is not debarred from subsequently raising the question that that application was not within limitation.

(4) Where no objection to the execution is taken, and the application becomes partly or wholly fructuous and such fructification necessarily involves the assumption that the application was made within limitation, then after such fructification the judgment-debtor is debarred by the principle of *res judicata* from raising the question that that application was not within limitation.

(5) Where no objection is taken, but the application for execution does not fructify, the judgment-debtor is not debarred by the principle of *res judicata* from raising the question of limitation later.

If the judgment-debtor does not appear and offer any objection, and the court had issued notice on the supposition that the application for execution was in time, no occasion arises for the court to enter upon an inquiry as to whether the application is or is not barred by time. A mere order that the decree should be executed, which under order XXI, rule 23(1) has to be automatic, can not be regarded as a definite adjudication, as between the decree-holder and the judgment-debtor, of any objection which might have been raised if the judgment-debtor had appeared, so as to operate as a bar by implication at all subsequent stages of the proceeding. If the application does not fructify and is struck off, there is no bar of *res judicata* against the judgment-debtor. If, on the other hand, some further step is taken, which amounts to the application for execution fructifying, so as to become analogous to a suit being decreed, then the judgment-debtor would be barred by the principle of *res judicata* from raising the question subsequently.

[*Per NIAMAT-ULLAH, J.* :—There may be cases of implied decision of the question of limitation. An order of the court read with other circumstances of the case may lead to the conclusion that the question was present to the mind of the court which meant to decide it but gave no adequate expression to its intention in the order; so that a conscious determination of the question of limitation adversely to the judgment-debtor can be implied.]

Again, a judgment-debtor may not be precluded by the principle of *res judicata* from taking the plea of limitation, but he may yet be barred by the general principle of estoppel arising from his conduct in the course of execution proceedings. There may be cases in which the judgment-debtor's conduct may imply a tacit admission of the truth of the facts alleged in the decree-holder's application as saving limitation, and this admission coupled with other circumstances may operate as an estoppel.]

Genda Lal v. Hazari Lal, I. L. R., 58 All. ... 313

CIVIL PROCEDURE CODE, SECTION 11, EXPLANATION IV—*Constructive res judicata—Suit by second mortgagee in which validity of first mortgagee's decree was admitted—Third mortgagee, created after the suit, paid off the first mortgagee's decree—Third mortgagee impleaded in suit as a subsequent transferee—Third mortgagee not appearing and setting up a claim of priority by payment of first mortgagee's decree—Subsequent suit claiming such priority—Whether barred by res judicata.* The first mortgagee obtained a decree for sale on his mortgage and purchased the property at the execution sale. Before the sale was confirmed the second mortgagee (who was the same person as the first mortgagee) brought a suit on his mortgage, in which he

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set forth the first mortgage and the execution sale thereon; he claimed that he should be paid the surplus sale proceeds, but that in case the previous execution sale was set aside then the mortgaged property should be sold for realisation of his money. A third mortgage was created after the filing of this suit, and the third mortgagee discharged the first mortgagee's decree, and the execution sale was set aside. The second mortgagee then impleaded the third mortgagee as a subsequent transferee in the suit, but made no mention of the discharge of the first mortgagee's decree by the third mortgagee. The third mortgagee did not appear and set up a claim of priority on the ground of having discharged the first mortgagee's decree, and the suit was decreed without any provision as to whether the sale was to be subject to, or free from, any prior encumbrance. The third mortgagee then brought a suit for a declaration that she had the rights of a prior mortgagee by reason of the discharge of the first mortgagee's decree:

*Held*, that the suit was not barred by *res judicata* by reason of the *ex parte* decree passed in the second mortgagee's suit, in which the third mortgagee had not appeared and expressly claimed her right of priority; for, the validity of the prior mortgage decree was not in any way disputed by the second mortgagee in his suit—indeed it was expressly admitted—and therefore the matter was not in issue at all and there was no occasion for the third mortgagee to set up the validity of that mortgage decree or the rights acquired by her *pendente lite*. She was a necessary party in her capacity as a subsequent transferee, but not a necessary party in her capacity as a prior mortgagee. As the validity of the prior mortgage was admitted in the plaint, and she was professedly impleaded as a subsequent transferee, there could be no reason to require that she must necessarily have appeared in court and set up rights under the prior mortgage which was not disputed by the plaintiff.

If the decree had directed that the property was to be sold free from any prior encumbrances the result might have been different, but there was no such direction in the present case.

*Sri Gopal v. Pirthi Singh*, I. L. R., 24 All., 429 and *Mahomed Ibrahim Hossain v. Ambika Pershad Singh*, I. L. R., 39 Cal., 527, distinguished.

*Ram Dhan v. Chunni Kunwari*, I. L. R., 58 All. 1056

CIVIL PROCEDURE CODE, SECTION 24—District Judge can not transfer an appeal under section 476B of the Criminal Procedure Code to a Subordinate Judge ... 85

CIVIL PROCEDURE CODE, SECTIONS 47, 60; ORDER XXI, RULE 64—*Attachment and sale of property exempted by law—Objection not raised by judgment-debtor before the sale—Objection raised after sale but before confirmation—Whether barred—Estoppel—Constructive res judicata.* In execution of a money decree a house of the judgment-debtor was attached and sold; the judgment-debtor did not appear or raise any objections. After the sale, but before it was confirmed, he appeared and made an application under section 47 of the Civil Procedure Code objecting to the sale on the ground that the house was that of an agriculturist and therefore exempt from attachment and sale:

*Held*, that the objection was maintainable. So long as the sale had not been confirmed it could not be said that there had been, by necessary implication, any decision, at any stage of the case, that the property was saleable, which would be conclusive as between the parties and would operate as a bar against all objections. Order XXI, rule 64 authorises the execution court to order a sale of the property, provided it is liable to sale; a mere order of sale does not necessarily decide or mean that the

property is saleable. The right to object to the sale would arise after the sale had taken place. The mere fact that the judgment-debtor was negligent at an earlier stage and did not object to the attachment itself would not necessarily amount to an estoppel against him, as there could be no estoppel against a statutory right.

Pokhar Singh v. Tula Ram, I. L. R., 58 All. ...

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CIVIL PROCEDURE CODE, SECTION 52—Assets of deceased person in the hands of his heir—Right to receive a periodical future income

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CIVIL PROCEDURE CODE, SECTION 52—*Legal representative—Decree against assets of deceased debtor in the hands of a legal representative—Other legal representatives, also having assets, impleaded after limitation—Suit can not be decreed against them nor the assets in their hands touched—No representative capacity—Limitation Act (IX of 1908), section 22.* If several persons are in possession of the assets of a deceased person, then each of them is, to the extent to which he is in possession of such assets, a legal representative of the deceased person; and no one of them represents the entire assets or estate of the deceased person. So, if the creditor sues only one of such persons as a legal representative of the deceased debtor, but not in a representative character as being in law competent to represent all the others or the whole estate, and impleads the others after expiry of the period of limitation, no decree can be passed against the entire assets, or affecting the assets in the hands of the defendants who were impleaded beyond time.

Manni Gir v. Amar Jati, I. L. R., 58 All. ...

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CIVIL PROCEDURE CODE, SECTION 60—*Property saleable in execution—Pari or turn to receive offerings at a temple—Unconnected with any personal services or duties to be performed—Civil Procedure Code, section 52—Assets of deceased person in the hands of his heir—Right to receive a periodical future income.* Where offerings are made to a deity at a temple and the persons who have a right to receive the same have not to render services involving qualifications of a personal nature, such as officiating at the worship, as a consideration for the receipt of the offerings, such a right is transferable property and can be attached, in execution of a decree, and sold by auction to the general public. Where there is no connection between the receipt of a share of the offerings and the performance of the service at the temple, the sale is not restricted to a limited class of persons and can be made to the general public.

In execution of a decree against the assets of a deceased person in the hands of his heir, the right to receive the offerings periodically in future can be attached and sold, as being such an asset, and not only the collections which have actually been made by the heir.

Nand Kumar Datt v. Ganesh Das, I. L. R., 58 All. ...

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CIVIL PROCEDURE CODE, SECTIONS 68, 70, 71—*Execution transferred to Collector for sale of zamindari property—Sale held and confirmed, and execution record re-transmitted to civil court—Subsequent application to Collector to set aside sale on the ground of fraud—Jurisdiction—Inherent power to cancel previous order for the ends of justice—Suit challenging order setting aside sale after confirmation.* A Collector has jurisdiction to set aside the sale of immovable property held in execution of a decree transferred to him by the civil court under section 68 of the Civil Procedure Code, after the sale has been confirmed by him and the record has been re-transmitted to the civil court, if he is satisfied that the decree-holder, by the exercise of fraud, kept the judgment-debtor ignorant of the execution proceedings.

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culminating in the sale of the property and of the confirmation of sale, when as a consequence of his fraud the decree-holder succeeded in purchasing the property of the judgment-debtor for much less than its real value.

A Collector when executing a decree transferred to him under section 68 may not be a "court", but an order passed by him either confirming or setting aside a sale is certainly a judicial order. An officer acting judicially has, just like a court, inherent jurisdiction to recall and cancel his invalid orders and to make such orders as may be necessary for the ends of justice or to prevent abuse of process. Fraud vitiates all proceedings including judicial orders, and if the Collector is satisfied that the decree-holder perpetrated fraud not only in publishing or conducting the sale but also in keeping the judgment-debtor ignorant of the fact of the confirmation of the sale, he has inherent power to set aside the sale with a view to prevent an abuse of the proceedings held by him.

Such exercise of inherent power in the present case would not be acting in contravention of the provisions of any rule of law. Rule 998 of the Manual of Orders, Revenue Department, which has been framed by the Local Government under section 70 of the Civil Procedure Code, prohibits the challenging of an order confirming a sale, but that rule is restricted in its scope to the grounds mentioned in rules 996 and 997 for setting aside a sale, and has no application to cases in which the order confirming the sale has been secured by the auction purchaser by the exercise of fraud. Further, rule 998 prohibits the institution of a suit and not the exercise of the inherent power possessed by an officer acting judicially to correct his judicial orders.

The re-transmission of the decree to the civil court no doubt put an end to the jurisdiction of the Collector to take further proceedings in execution of the decree, but it could not divest him of the inherent jurisdiction possessed by him to correct his judicial orders or to review the same. The inherent power vested in a court, or in an officer acting judicially, to set right judicial orders previously passed does not depend on the continuance of the proceedings in the course of which the order was passed, but can be exercised even if the proceedings have terminated.

*Nand Kishore v. Badan Singh*, I. L. R., 48 All., 568, disapproved.

*Aijaz Ahmad v. Nazir-ul-Hasan*, I. L. R., 58 All. ... 249

CIVIL PROCEDURE CODE, SECTION 86—Applicable to winding-up proceedings in court—Company court can not order payment by a contributory who is a Sovereign Prince or Ruling Chief ... 742

CIVIL PROCEDURE CODE, SECTION 92—*Suit for settling a scheme for management of public religious trust—Decree settling scheme and giving liberty to apply for modification of scheme from time to time—Reservation of power to modify the scheme not ultra vires—Application for removal of a trustee for misconduct is not entertainable—Jurisdiction—Inherent power—Civil Procedure Code, section 151.* In a suit under section 92 of the Civil Procedure Code for settling a scheme of management for the trust the court passed a decree laying down a detailed scheme and further provided in the decree that it would be open to any two members of the trust committee or any two other persons interested in the trust to apply to the court for any modification of the scheme which might from time to time be considered necessary or desirable in the interest of the trust or for the protection of the trust property. Some years afterwards an application was made to the

court by two persons interested in the trust, praying (a) that a modification be made in the method of selection of the president of the trust committee and in the rules regarding quorum at meetings of the committee; and (b) that the present president be removed from office on the ground that he had committed mismanagement and misappropriation, and that steps be taken to trace and recover the misappropriated property.

*Held*, that the court had jurisdiction to reserve to itself the power to amend the scheme in future, *suo motu* or otherwise; and if, in order to minimise the chances of frivolous motions being made, it announced that it would not exercise such power unless at least two persons interested joined in the application, that was of no significance on the question of the existence of such power. There is nothing in section 92 of the Civil Procedure Code which makes the reservation of a power to modify the scheme in future *ultra vires*. The power of the court to settle a scheme for the administration of a trust is sufficiently comprehensive to include a provision which makes the scheme alterable by the court if necessary in future. If the scheme is amended subsequently by the court within the limits laid down by the decree, the court is giving effect to its own decree rather than amending it. In so far as the present application sought modification of the scheme in the exercise of the court's power reserved by the scheme itself, the application was therefore maintainable.

In so far as the present application sought reliefs outside the scope of the court's power of modification reserved by the scheme itself, the only section which could justify such alterations or amendments of the scheme was section 151 of the Civil Procedure Code. The inherent power of the court to modify a scheme prepared by itself should be exercised within the narrow scope of where it is necessary to prevent abuse of the process of the court or where the ends of justice plainly demand it. The prayer in the application for removal of the president on the ground of misconduct could not be entertained, conformably with the provisions of the scheme; the fact that a particular officer, appointed in accordance with the scheme, has misbehaved was no ground for modification of the scheme itself; the remedy was by way of a suit brought under section 92 for his removal. The prayer for the tracing and recovery of the misappropriated property was not a matter of modification of the scheme either within the power reserved or within the inherent power of the court, and was not entertainable on the application.

- Sri Swami Rangacharya v. Ganga Ram, I. L. R. 58 All. 538
- CIVIL PROCEDURE CODE, SECTION 94(d), *See* Civil Procedure Code, order XL, rule 1(2) ... 949
- CIVIL PROCEDURE CODE, SECTION 115—"Case decided"—*Order setting aside an award in a pending suit.*] *Held*, in accordance with the principle of *stare decisis*, that no revision lies from an order setting aside an arbitration award while the suit still remains pending, inasmuch as no case has yet been decided. within the meaning of section 115 of the Civil Procedure Code.
- Tulshi Ram v. Brindaban Das, I. L. R., 58 All. ... 946
- CIVIL PROCEDURE CODE, SECTION 115—Orders passed by Insolvency court—High Court's powers of revision, *See* Provincial Insolvency Act, sections 5, 75 ... 639
- CIVIL PROCEDURE CODE, SECTION 115; ORDER XXIII, RULE 1—*Withdrawal of suit with liberty to bring fresh suit—Granted by appellate court—Grounds—Revision.*] A suit for a declaration relating to certain shops was dismissed on the merits and *inter alia* on the ground of section 42 of the Specific Relief Act.

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During the course of the appeal the plaintiffs appellants applied for leave to withdraw the suit under order XXIII, rule 1, on the ground that there was a fatal defect, namely the omission to claim an alternative relief in the event of their being found to be out of possession. The appellate court granted the application, but its order did not show any reasons for doing so; it did not even describe what the formal defect was, nor discuss whether it was a fatal defect:

*Held*, that although the High Court was very reluctant to interfere in revision with orders passed under order XXIII, rule 1, it should interfere where it considers that the lower court has not applied its mind to the matter before it, or, in other words, has not exercised its discretion in a judicial manner; where the court has not observed the rule and has not had before it the considerations by which it ought to be guided in the exercise of its discretion.

*Jhunku Lal v. Bisheshar Das*, I. L. R., 40 All., 612, *Chiranji Lal v. Irphan Ali*, [1935] A. L. J., 277, and *Kali Ram v. Dharman*, [1934] A. L. J., 821, distinguished.

- Raghubir Das v. Sital Prasad Rao*, I. L. R., 58 All. ... 245
- CIVIL PROCEDURE CODE, SECTION 141—Applicable to proceedings in court in winding up a company ... 742
- CIVIL PROCEDURE CODE, SECTION 141—Schedule II, paragraph 1 can not be made applicable to proceedings in execution ... 797
- CIVIL PROCEDURE CODE, SECTION 151—Inherent power—Modifying, upon application by persons interested, a scheme for management of a trust, formulated by a decree passed under section 92 of the Civil Procedure Code ... 538
- CIVIL PROCEDURE CODE, ORDER VII, RULE 6—Availability of a ground other than the one pleaded for exemption from limitation ... 261
- CIVIL PROCEDURE CODE, ORDER XXI, RULES 18, 20—*Cross decrees—Set off—Mortgage decree for sale can not be set off against a simple money decree.*] A mortgage decree for sale is not a decree for payment of money and can not be set off, under order XXI, rule 18 of the Civil Procedure Code, against a simple money decree. All that rule 20 lays down is that the provisions of rules 18 and 19 shall apply to cross mortgage decrees, i.e. if two contending parties hold mortgage decrees against each other, then they will be able to set off the decrees one against the other; and nothing in rule 20 warrants the view that a mortgage decree can be set off against a simple money decree. The decree-holders, respectively, of the two decrees do not fill the same character, and therefore, according to rule 18(3)(a), there can be no set off.
- Nagesar Ram v. Rajnet Ram*, I. L. R., 58 All. ... 907
- CIVIL PROCEDURE CODE, ORDER XXI, RULE 23(1) AND (2)—Difference between an order for execution passed under sub-rule (1) and one under sub-rule (2)—Principle of constructive *res judicata* ... 313
- CIVIL PROCEDURE CODE, ORDER XXI, RULE 58—*Claimant's objection to attachment of property—Proceeding in execution—Reference to arbitration ultra vires—Jurisdiction—Civil Procedure Code, section 141; schedule II, paragraph 1.*] An objection under order XXI, rule 58 of the Civil Procedure Code, creating as it does a dispute between the decree-holder and a person claiming property which the decree-holder seeks to put to sale as being the property of his judgment-debtor, is a matter relating to the execution, discharge or satisfaction of a decree and is a proceeding in execution. Such a proceeding can not be made the subject of a reference to arbitration. Schedule II, paragraph 1 of the Civil Procedure Code is not in terms applicable to such a proceeding, nor can it be made applicable by virtue of section



- 141 of the Code, for that section applies to "original matters" and not to proceedings in execution. Accordingly the court has no jurisdiction to refer to arbitration a dispute under order XXI, rule 58, and such a reference is *ultra vires*.
- Sarjula Beharilal v. Sukhdeo Prasad, I. L. R., 58 All. 797
- CIVIL PROCEDURE CODE, ORDER XXII, RULE 5—*Dispute among several persons as to who is the legal representative of a deceased appellant—Order deciding one of them to be the legal representative—Subsequent suit between same persons regarding succession to the deceased person—Res judicata.*] A decision under order XXII, rule 5 of the Civil Procedure Code of a dispute as to which of several persons is the heir and legal representative of a deceased appellant is a decision in a summary proceeding for the purpose of continuance of the appeal, and can not operate as *res judicata* in a subsequent suit between the same persons regarding succession to the property of the deceased person, which property was not in suit in the earlier litigation. *Raj Bahadur v. Narain Prasad*, I. L. R., 48 All., 422, dissented from.
- Antu Rai v. Ram Kinkar Rai, I. L. R., 58 All. 734
- CIVIL PROCEDURE CODE, ORDER XXIII RULE 3; ORDER XXXIV, RULES 4 AND 5—*Adjustment of suit after the passing of preliminary decree—Suit pending—Adjustment must be given effect to.*] Inasmuch as a preliminary decree for sale does not terminate a mortgage suit, which continues till a final decree has been passed, it is open to the parties, after a preliminary decree has been passed, to enter into a compromise or otherwise agree to an adjustment in respect of the subject-matter of the suit, and the court is bound to give effect to such compromise or adjustment and can not overrule it on the ground that nothing short of payment of the mortgage money as directed by the preliminary decree can prevent the passing of the final decree. Order XXXIV, rules 4 and 5 of the Civil Procedure Code are subject to the provisions contained in order XXIII, rule 3.
- Inayat Khan v. Harbans Lal, I. L. R., 58 All. 565
- CIVIL PROCEDURE CODE, ORDER XXXIII, RULE 15—*Fresh suit after dismissal of application to sue as a pauper—Payments of costs incurred by Government and the opposite party in opposing that application—Condition precedent to institution of suit, if such costs were awarded by the court.*] Where a person has been unsuccessful in an application for permission to sue *in forma pauperis* and the court has awarded costs to the Government and the opposite party in their opposition to the application, and such person subsequently institutes a suit in the ordinary manner, then these costs must be paid prior to the filing of the plaint which commences the suit, and where the costs have not been paid or deposited prior to the institution of the suit the court is bound to dismiss it. But where the court in dismissing the application for permission to sue *in forma pauperis* has either disallowed costs or made no order as to costs, he is entitled to maintain his suit as an ordinary litigant without making any payment to the Government or to the opposite party in respect of the costs incurred in opposing the application.
- Shiam Sundar Lal v. Savitri Kunwar, I. L. R. 58 All. 192
- CIVIL PROCEDURE CODE, ORDER XXXVIII, RULE 5—*Applicable where, before the execution sale of the whole of the mortgaged property, it is apprehended that a personal decree will have to be passed—Jurisdiction—Civil Procedure Code, order XXXIV, rule 6.*] Where, before the whole of the mortgaged property has been sold in execution of a decree under order XXXIV, rule 5 and a right to apply for a personal decree under rule 6

can have arisen, the mortgagee satisfies the court that the amount likely to be realised by the sale of the rest of the mortgaged property would not be sufficient to satisfy the decretal amount and that a personal decree for the balance would have to be passed subsequently under order XXXIV, rule 6, then, inasmuch as the original suit is still undisposed of, in the sense that the plaintiff mortgagee is entitled in certain circumstances to obtain a personal decree, the court has jurisdiction to act under order XXXVIII, rule 5, if the conditions contemplated by that provision are made out, and to attach other properties of the mortgagor before any personal decree under order XXXIV, rule 6 has been passed or applied for.

Shyam Lal v. Bahal Rai, I. L. R., 58 All. ... 884

CIVIL PROCEDURE CODE, ORDER XL, RULE 1(2)—*Receiver—Appointment of receiver of mortgaged property, pending decision of appeal from preliminary decree for sale on simple mortgage—Jurisdiction—Civil Procedure Code, section 94(d)—Interpretation of statutes—Words—Same words used in different places of the same section should have the same meaning.*]  
Pending the decision of an appeal from a preliminary decree for sale on a simple mortgage, the mortgagee decree-holder applied in the appellate court for the appointment of a receiver of the mortgaged property on the allegation that the defendant mortgagor was dealing with the mortgaged property in such a way as to depreciate its value seriously:

*Held*, that under the provisions of the Civil Procedure Code the court has no power to appoint a receiver of any property so as to remove from the possession or custody of the property any person, whether a party to the suit or not, whom any party to the suit has not a present right so to remove; and inasmuch as the mortgagee, in the case of a simple mortgage, has no right to obtain possession of the mortgaged property or its rents and profits by dispossession of the mortgagor before the termination of the mortgagor's interest by actual sale of the property in execution of the final decree for sale, a receiver could not be appointed in the present case to take possession of the mortgaged property or its rents and profits.

The authority to appoint a receiver is prescribed in order XL, rule 1 of the Civil Procedure Code and the court cannot act outside that rule. Section 94(d) of the Code does not confer unrestricted powers on courts to appoint a receiver in any case, because the section contains the words "if it is so prescribed", i.e. prescribed by the rules; section 94(d) is, therefore, governed by order XL, rule 1.

The general power given under sub-rule (1) of order XL, rule 1 has been curtailed by sub-rule (2). The language of sub-rule (2) is plain, and the words "any person" in that sub-rule are general and comprehensive so as to include persons who are parties as well as persons who are not parties to the suit. There is no justification for putting a forced interpretation on sub-rule (2) by adding the words "other than parties to the suit" after the words "any person".

It is a well settled rule of interpretation that the same expression used in the same section at different places is to be given the same meaning. The words "any person" also occur in sub-rule 1(b) of the rule; and it is impossible to hold that the words "any person" in sub-rule 1(b) mean "any person other than a party to the suit".

It is of the essence of a simple mortgage that the corpus of the mortgaged property forms the security for the debt but the income is the property of the mortgagor and he is absolutely



entitled to appropriate it until the property passes out of his ownership by sale. There would, therefore, be no point in appointing a receiver, as regards the collection of such income.

The remedies which an English mortgagee can claim, or which even a simple mortgagee in England can claim, being very different from those of a simple mortgagee in India, English cases have no bearing on the present case, and all the more because in England there is no rule corresponding to sub-rule (2) of order XL, rule 1 of the Civil Procedure Code. Again, the law having been codified in India, the question of jurisdiction to appoint a receiver depends not so much on considerations of equity or of hardship as on the language of the statutory enactment itself. Further, no such considerations can arise in favour of the simple mortgagee, who knows that by the terms of the mortgage the mortgagor is entitled to possession and usufruct of the property until actual sale.

There is ample provision in order XXXIX, rule 1 of the Civil Procedure Code to prevent waste or damage of the mortgaged property by the mortgagor.

Ram Swarup v. Anandi Lal, I. L. R., 58 All.	...	949
CIVIL PROCEDURE CODE, SCHEDULE II, PARAGRAPH 1—Not applicable to execution proceedings	...	797
COMPANIES ACT (VII OF 1913), SECTION 3—Company court has inherent jurisdiction, in the absence of specific authority, to order compliance with mandatory provisions of the Companies Act	...	988
COMPANIES ACT (VII OF 1913), SECTION 26—Association not for earning profits or declaring dividends—"Mutual concern"—Liability to income-tax	...	1003
COMPANIES ACT (VII OF 1913), SECTION 36— <i>Register of members—Right to obtain a copy—Enforcement of the right by order of company court on a petition—Jurisdiction—Companies Act, section 3—Inherent jurisdiction to order compliance with mandatory provisions of the Act—Mandatory injunction without a regular suit—General Rules (Civil), chapter XIX-A, rule 2.</i> Section 3 of the Companies Act provides that the courts specified in that section have jurisdiction under the Companies Act. Accordingly, although in some cases there is no specific provision in the Act as regards the authority of the court to enforce compliance with the provisions creating statutory obligations on companies, nevertheless the courts referred to in section 3 have inherent jurisdiction to pass orders to compel due observance of the statutory obligations of a company and for giving redress to a person aggrieved by an illegal omission or refusal on the part of a company. Where there is a wrong there must be a remedy.		

A company court, therefore, has jurisdiction to direct by mandatory order a company to comply with its statutory obligation under section 36(2) of the Companies Act to supply a copy of the register of members to a shareholder on requisition by him. Such jurisdiction cannot be deemed to be expressly or impliedly barred by reason of the circumstance that clause (3) of section 36 provides a penalty by way of fine for non-compliance with clause (1) or (2) and makes no express provision for the power of the court to order delivery of a copy, though it provides for an order by the court to compel an immediate inspection of the register. The only remedy which the shareholder can have is by way of a mandatory injunction from the company court. The provision of an order for immediate inspection was specially provided only to meet a case of urgency where delay would frustrate the purpose of the inspection.

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Although, ordinarily, mandatory and perpetual injunctions can be granted only on a regular suit being filed, yet, as indicated in rule 2 of chapter XIX-A of the General Rules, framed by the High Court under the Companies Act, proceedings for the enforcement of the provisions of the Companies Act are ordinarily to be initiated by petitions presented to the court exercising jurisdiction under that Act. On such a petition being filed such court has jurisdiction to issue a mandatory injunction, where that is the appropriate method to give redress against an infringement of the provisions of the Act.

British India Corporation, Ltd. v. Robert Menzies,  
I. L. R., 58 All. ... 988

COMPANIES ACT (VII OF 1913), SECTIONS 184, 186, 187—*Civil Procedure Code, section 86—Jurisdiction—Putting a Sovereign Prince or Ruling Chief in the list of contributories—Making calls on and ordering payment by a contributory who is a Sovereign Prince or Ruling Chief—Civil Procedure Code, section 141—Proceedings in court in winding up of company.* Section 86 of the Civil Procedure Code does not apply to proceedings under section 184 of the Companies Act for settling the list of contributories, but it does apply to all proceedings under sections 186 and 187 of the Companies Act for ordering payments to be made by the contributories.

Section 184 of the Companies Act imposes a statutory duty upon the court to settle the list of contributories, and the matter is not optional or discretionary. Accordingly, if a Sovereign Prince or Ruling Chief is a contributory, he must be placed in the list of contributories; and for this purpose no previous consent of the Governor-General in Council is required under section 86 of the Civil Procedure Code, for it can not be said that when such a list of contributories is to be settled the court is starting any proceeding analogous to that of a suit brought by a private person against a Sovereign Prince or Ruling Chief.

On the other hand, the court's action under section 186 or 187 of the Companies Act is discretionary, and an order will be made under those sections if the case is a fit case. An order for payment by a contributory can be made under those sections only in cases where a suit to recover the amount would be maintainable, and no such order will be made under those sections if by such procedure the opposite party would be deprived of some defence or answer which would be open to him in a suit for the money. Section 86 of the Civil Procedure Code confers a special privilege on Sovereign Princes and Ruling Chiefs which entitles them to defend a suit on the mere ground that the previous consent of the Governor-General in Council has not been obtained. The court, therefore, under sections 186 and 187 of the Companies Act can not have jurisdiction to override the provisions of section 86 of the Civil Procedure Code and make an order for payment against a Sovereign Prince or Ruling Chief in the absence of the previous consent of the Governor-General in Council. No jurisdiction exists in a British Indian court to enforce any personal liability against a Sovereign Prince or Ruling Chief, unless the case can be brought within the scope of section 86 of the Civil Procedure Code; and inasmuch as in the present case none of the conditions mentioned in clauses (a), (b) and (c) of sub-section (2) of section 86 existed, no consent of the Governor-General in Council could be obtained, and therefore no order under section 186 or 187 of the Companies Act could be passed at all.

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Proceedings under section 186 or 187 of the Companies Act are proceedings in a court of civil jurisdiction to which section 141 of the Civil Procedure Code is applicable, and therefore section 86 is also applicable.	
Official Liquidators, Dehra Dun-Mussoorie Electric Tramway Co. v. President, Council of Regency, Nabha State, I. L. R., 58 All. ...	742
COMPANIES ACT (VII OF 1913), SECTION 185—Contributory—Money due from a person upon a contract given to him by the liquidator for working the mills of the company in liquidation—Such person not a contributory ...	925
COMPANIES ACT (VII OF 1913), SECTION 188—“Purchaser”—“Other person from whom money is due”—Scope of section—Money due from a person upon a contract given by the liquidator to him for working the mills of the company in liquidation—Order for payment of such money to the liquidator or into Bank—Execution of such order—Jurisdiction.] Where with the approval of the court a contract was given by the official liquidator to a third person for the working of the mills of the company in liquidation, and according to the terms of the contract a certain sum fell due from such person, and upon the application of the official liquidator the company Judge ordered that person to pay the amount to the Imperial Bank of India and directed that, in default, the order be executed in the manner of a simple money decree, it was held that the company Judge had no jurisdiction under the Companies Act to pass any such order.	
Disputes which may arise with third parties out of transactions entered into by the liquidator with them are foreign to the jurisdiction of the court in winding up proceedings.	
Section 188 of the Companies Act did not give jurisdiction to the company Judge to pass the order in question. That section means that where an order can be passed against a person to pay to the liquidator, it may be passed against the person to pay to the Bank. An order to pay to the liquidator can be passed against a contributory, or trustee, or receiver or such other person as is mentioned in section 185. Therefore, unless a person comes under section 185, the company court has no jurisdiction to pass an order against him under section 188 to pay any sum of money to the Bank.	
The word “purchaser” in section 188 must be taken to refer to the word “contributory” which immediately precedes it, and it means the purchaser of the interest of a contributory. The words, “or other person from whom money is due”, in the section have reference to a person from whom money is due under section 185, so far as it is intended that an order enforcing payment should be made, but under section 188 it is open to the court to order the payment to be made to the Bank instead of to the liquidator.	
John Brothers v. Official Liquidator, Agra Spinning and Weaving Mills Co., I. L. R., 58 All. ...	925
COMPANIES ACT (VII OF 1913), SECTION 235—Merger of cause of action—Award, in misfeasance proceedings, of damages against manager, auditor, etc., for fraud does not bar suit for damages against private persons who also contributed to the fraud ...	342
COMPOSITION DEED—Arrangement—Nature and essentials—Debtor conveying bulk of his property to trustees for the benefit of his creditors—Debtor thereby divested of his interest in the property—Not attachable subsequently by a decree-holder—Whether knowledge and consent of all the creditors is essential—Whether reservation of a small portion of the property	

for the debtor invalidates the transaction—Registration whether necessary—Registration Act (XVI of 1908), section 17(2)(i)—Trusts Act (II of 1882), section 5—Interpretation of statutes—General law and special law.] An arrangement was effected as a result of meetings between the representative of a firm, which was in difficulties on account of heavy liabilities, and some of the creditors and a composition was decided upon. The creditors present nominated seven persons from among themselves as trustees and a deed was executed by which the proprietors of the debtor firm assigned the bulk of their property, movable and immovable, to the trustees for the benefit of the creditors, giving them full powers to realise all the property and apply the proceeds towards the composition and payment of the debts. The deed was signed by the debtor and the seven trustees, and later on by some other creditors in token of their assent. The trustees and the other assenting creditors held claims against the debtor to the extent of Rs.8½ lakhs out of a total indebtedness of Rs.10 lakhs. A small portion of the debtor's property, of the value of about Rs.10,000, was allowed to be reserved by the debtor, and this fact was mentioned in the deed. The deed also mentioned that any other property which might be discovered to belong to the debtor would also be assigned and delivered to the trustees, but no such property was discovered. It appeared that notice had not been given to, or a meeting held of, all the creditors; nor were regular proceedings of the meetings drawn up or the accounts overhauled at the meetings. An examination of the circumstances in which the deed was executed showed that it was a fair and *bona fide* transaction, that there was no concealment or fraud and that no undue preference had been given to the trustees or any other creditor. The deed was not registered. One of the creditors who had not assented to the composition deed subsequently sued on his debt and in execution of his decree sought to attach and sell property which had been assigned by the composition deed, the validity of which he assailed on various grounds. *Held—*

Arrangements by which a debtor makes a *bona fide* assignment of his entire property to trustees for the benefit of his creditors have the effect of divesting the debtor of all interest in the property so assigned, so that it can not be the subject of attachment issued subsequently at the instance of a creditor who has obtained a decree upon his debt.

Even if such a deed of composition does not comprise the whole of the property of the debtor it is not void if the transaction is fair and *bona fide*. The mere fact that the creditors allowed the debtors to reserve a small portion of their property, which is mentioned in the deed, for their own purposes would not invalidate the transaction. The test is whether there has been any concealment or fraud by the debtors. Any property so reserved does not vest in the trustees and a subsequent execution creditor is free to proceed against it in execution.

If the transaction is a fair and *bona fide* transaction, the composition deed is not void by reason of the fact that it is not signed by all the creditors. The giving of a notice to, or the holding of a meeting of, all the creditors is not essential, nor is it necessary that regular proceedings of the meeting should be drawn up or the accounts overhauled, before a composition deed can be said to be *bona fide*. All that is wanted is that there should be no fraud contemplated by the debtor and that the trustees should not be participants in any such fraud.

Such a deed of composition is not void by reason of its containing a clause empowering the trustees to employ the grantor or any other person in winding up the affairs of the grantor

and in collecting and getting in his estate and effects which have been assigned and in carrying on his trade or business if thought expedient by the trustees.

A composition deed can not be invalidated by any subsequent negligence on the part of the trustees in performing their duty.

So far as the Registration Act itself is concerned, a composition deed assigning the debtor's property to trustees for the benefit of creditors does not, by reason of the exemption contained in section 17(2)(i) of the Act, require registration; but this does not mean that if the document requires registration under any other enactment the exemption contained in section 17(2) would prevail against that other enactment. The exemption from registration is available to a composition deed only to the extent that it purports to create or assign a right in immovable property and not when it amounts to a trust, which obviously contemplates something more than the mere creation or assignment of a right in immovable property, and which requires registration under section 5 of the Trusts Act. It is true that in a composition deed the essence is undoubtedly the compounding of debts, but where it lays down the machinery of a trust, the trust is an integral part of it and can not be said to be merely accidental or incidental. So far, therefore, as the composition deed is a trust it is not valid, for want of registration.

There is, no doubt, a presumption that a subsequent general enactment will not override the provisions of an earlier special enactment, unless such an intention is clearly manifested; but this principle is not applicable to the case. The Registration Act and the Trusts Act may both be said to be enactments dealing with special subjects, and both of them equally might be said to deal with general subjects. Further, as already pointed out, there is really no conflict between the two Acts so far as the question of registration is concerned.

Govind Ram v. Kashi Nath, I. L. R., 58 All. ... 505

CONDITION IN RESTRAINT OF ALIENATION AND REPUGNANT TO BEQUEST, *See*  
Construction of document ... 467

CONSTRUCTION OF DOCUMENT—*Will—Bequest whether of absolute interest or of life interest—Bequest of house with a condition that if legatee sells during her life time she will have life interest in the money, with reversion to her daughters—Condition in restraint of alienation and repugnant to bequest—Succession Act (XXXIX of 1925), section 133.* By his will the testator bequeathed his movable property to his wife during her life time, and after her death to his daughters in a specified manner; by another clause of the will he bequeathed his house, and any other immovable property which there might be, to his wife, but added a condition that "should my wife at any time wish to sell or dispose of the house she is hereby authorised to do so at a reasonable price and without detriment or loss to the estate and to invest the whole of the sale proceeds in Government promissory notes, and the interest thereof shall be enjoyed by my wife during her life time", and after her death the interest and the principal was to go to his daughters in the same manner as was already specified in the case of the movable property. The widow remained in possession of the house till her death. The question arose whether this will gave her an absolute estate in the house or only a life estate.

*Held*, that having regard to the circumstances that the will dealt separately with the movable and the immovable property; that in the case of the former the testator in express terms gave his wife only a life interest whereas in the case of the latter the language used was different and it was not said that he gave

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her only a life interest; that the testator did not in terms say that the widow could not sell the house except upon certain definite conditions but only that if she should sell it then she would have only a life interest in the proceeds of sale; that he did not in any way limit her interest in the event of the house not being sold; that the only restriction imposed on the widow's right to deal with the house was in respect of her power of sale in her life time and not her power to dispose of it by will; it followed that the testator bequeathed to her an absolute interest in the house, though intending at the same time to annex a restriction on her rights as an absolute owner in the matter of disposing of the property during her life time, and intending that the gifts in remainder and gifts over were to arise only in the event of sale. Consequently the absolute interest in the house vested in the widow and she was the full owner of it.

The provisions in the will depriving the widow of her absolute interest in the house in the event of her selling it were repugnant to the devise or bequest itself and were void. The ulterior gifts which were to take effect upon the happening of the sale were therefore void, but that could not affect the validity of the prior bequest, according to section 133 of the Succession Act.

- Administrator-General v. A. M. Bower, I. L. R., 58 All. 467
- CONSTRUCTIVE RES JUDICATA—Attachment and sale of property exempt by law—Objection raised by judgment-debtor after the sale, but before confirmation—Whether barred ... 360
- CONSTRUCTIVE RES JUDICATA—Might and ought—Mortgagor not appearing and raising plea that property incapable of sale—*Ex parte* decree—Raising such objection in execution ... 98
- CONSTRUCTIVE RES JUDICATA—Principle how far applicable in execution proceedings ... 98
- CONSTRUCTIVE RES JUDICATA—Principle how far applicable to execution proceedings ... 313
- CONSTRUCTIVE RES JUDICATA, *See* Civil Procedure Code, section 11, explanation IV ... 1056
- CONTEMPT OF COURTS ACT (XII OF 1926), SECTION 3—*Order to pay costs—Jurisdiction—Mode of enforcement of such order—Criminal Procedure Code, section 547—Inherent jurisdiction—Direction to Collector to realise by execution against property of the accused.* Where, in a case under the Contempt of Courts Act, XII of 1926, the High Court awarded a punishment of four months' simple imprisonment and also ordered the accused to pay a certain sum as costs of the Crown and of the complainant:
- Held*, (1) that the High Court had jurisdiction to pass the order for payment of costs; and (2), without deciding whether the costs could be realised as a fine under the provisions of section 547 of the Criminal Procedure Code, it was clear that the High Court had inherent jurisdiction to order the recovery of the amount, and in exercise thereof a warrant was issued to the Collector authorising him to realise the amount by execution, on the lines on which decrees are executed by the civil court, against the movable or immovable property of the accused.
- Emperor v. Wahid-ullah Ahrari, I. L. R., 58 All. ... 374
- CONTRACT ACT (IX OF 1872), SECTION 25(3)—Promise to pay time barred debt—Whether the promise must specifically mention that debt—Promissory note actually, though not expressly, in lieu of time barred debt plus a fresh advance ... 382
- CONTRACT ACT (IX OF 1872), SECTIONS 60, 61—*Appropriation of payments—Time up to which the creditor can make appropriation—Appropriation where only one debt, part of it being*



a secured debt and another part not amounting to a secured debt.] Where there has been a payment by a debtor to a creditor and no appropriation has been made either by the debtor or the creditor, it is open to the creditor to appropriate the amount or any part of it towards the payment of any debt and at any time, even during the pendency of the litigation concerning the payment, until the judgment is pronounced by the trial court, but not thereafter. If the creditor has not chosen to make any appropriation before then, the provisions of section 61 of the Contract Act come into operation and it is the duty of the court to direct the appropriation in accordance with that section. After the decision of the first court has been passed it would be too late for the creditor to make up his mind to appropriate the payment in a particular way.

Sections 60 and 61 of the Contract Act can not in terms apply to a single debt, but the principle underlying the sections has been applied as between the interest and the principal of a single debt, and may be applied where the debt consists of two definite and specified portions, standing on different footings, and it is possible to treat the two portions of the debt as distinct debts. In the case of a mortgage of joint family property made by the manager, for a debt of which a part only is for legal necessity, if at the time of the mortgage, or at least at the time when a payment is made, it is definitely known that the debt consists of two portions, one of which is binding on the family and the property and the other only on the manager personally, the debtor making a payment can specify to which portion the payment is to be credited, and in the absence of any specification by the debtor the creditor can appropriate the payment towards one or the other portion. But where it is not clearly known and ascertained that the debt consists of two such definite and specified portions, and especially where the mortgagee regards and maintains the entire debt as being one debt binding on the whole family, it is impossible for him to appropriate the payment towards an unknown and unspecified portion of the debt. In such cases no question of appropriation in its strict sense arises, and the payment must of necessity go towards the discharge of the whole debt treated as one single debt, and to be distributed rateably between the two portions as found by the court.

Gajram Singh v. Kalyan Mal, I. L. R., 58 All. ...	791
CONTRACT ACT (IX OF 1872), SECTIONS 149, 151—"Delivery" to railway and railway's responsibility as bailee, though no receipt granted or forwarding note received ...	576
COURT FEES—Petition for divorce under the Indian and Colonial Divorce Jurisdiction Act, 1926 ...	259
COURT FEES ACT (VII OF 1870), SECTION 6—Interpretation—Where a document can come under either schedule ...	146
COURT FEES ACT (VII OF 1870), SECTION 6—Succession certificate—Court fee payable according to provisions in force at the date of issue of the certificate ...	752
COURT FEES ACT (VII OF 1870), SECTION 7(iv)(c); SCHEDULE II, ARTICLE 17(iii)—Specific Relief Act (I of 1877), sections 39, 40, 42—Declaration—Consequential relief—Cancellation of instrument—Suit for declaration that plaintiff's title has not been affected by a sale deed executed by another person, it being void and ineffectual as against plaintiff—Cancellation not specifically asked for in plaint, and specifically disclaimed in statement made by plaintiff—Whether court can treat suit as one for cancellation—Construction of plaint for purposes of court fee—Court Fees Act, section 6.] The plaintiff brought a suit on the allegations that he and his brother formed a joint	

Hindu family, that the brother had, without any right, executed two sale deeds of parts of the family property in favour of the defendants, that the sale deeds were void and ineffectual, and that the plaintiff continued in possession. The relief claimed was a declaration (*istiqrar*) that by virtue of the sale deeds, which were void and ineffectual as against the plaintiff and the joint family property, the defendants had not acquired any right to any part of the property. A court fee of Rs.10 was paid, as for a declaratory relief, in respect of each of the two sale deeds. No question was raised in the lower courts as to the amount of court fee, but when the case came up in second appeal to the High Court objection was raised that the suit amounted to a suit for the cancellation of the sale deeds and that court fee was to be paid accordingly. The plaintiff maintained that there was no claim for cancellation, and that he claimed nothing more than a declaration that his rights in the property were not affected by the sales which he characterized as void and ineffectual as against his interests in the property.

*Held* by the Full Bench (BENNET, J., dissenting).—

1. Where a plaint is so worded as to disclose a suit falling either under section 39 or section 42 of the Specific Relief Act, it is not open to a court to treat the suit as one falling within the purview of section 39 of the Specific Relief Act if the plaintiff desires it to be construed as one under section 42 of that Act.

2. The court fee in this case was sufficient.

The word "*istiqrar*" may signify either "declaring" or "adjudging"; so that, where a plaintiff claims an "*istiqrar*" that his rights in certain property are not affected by a particular document because it is void as against him, he may be understood to be asking only a *declaration* that the transaction evidenced by the document is void and ineffectual as against his interests, or he may be understood to be asking for the document to be *adjudged void* against him and, therefore, claiming the relief of cancellation. Unless the plaintiff has expressly claimed the relief of cancellation, or unless on a proper construction of the plaint as a whole the court arrives at the conclusion that the suit is essentially and in substance one asking for cancellation and the plaintiff makes no amendment or disclaimer, it is not open to the court to treat the suit as one under section 39 of the Specific Relief Act though in form it is one which may come under section 42 of that Act and the plaintiff maintains and makes it clear by subsequent statement or amendment, if necessary, that the suit should be treated as one under section 42. After a plaintiff has declared unequivocally, by amendment or otherwise, that he desires no more than a declaratory relief of the nature described in section 42, the court must proceed on that footing for all purposes of court fee, leaving the plaintiff to take the possible consequences of his own action in deliberately instituting a declaratory suit where a suit for cancellation would have been more appropriate. Consideration of the frame of the suit for the purposes of court fee and that for the purposes of decision of the suit must be kept quite apart.

A suit for a declaration of right does not cease to be such and necessarily become one for cancellation of an instrument, if an instrument is specifically referred to as having no adverse effect on the plaintiff's rights. It is permissible for a plaintiff to obtain a declaration under section 42 of the Specific Relief Act that a certain instrument is void as against him and does not affect his rights. The scope of section 39 of the Act is distinct from that of section 42. The relief under section 39 has the effect of absolutely annulling the instrument and its contents wholly or in part; whereas the object of the relief



under section 42 is to obtain a recognition of the plaintiff's right, and the void or voidable character of the instrument comes under consideration incidentally for determining the plaintiff's right, and the relief has not the effect of absolutely annulling the instrument wholly or in part. There is a wide difference between setting aside a sale and holding that the plaintiff's rights are not affected by it.

*Per* BENNET, J.:—Section 39 of the Specific Relief Act deals with written instruments, and section 42 does not; the cause of action for section 39 is the execution of the written instrument. If the plaintiff does ask the court to adjudge that a written instrument is void or voidable, then the plaintiff is clearly one under section 39, and the addition of any other relief for a declaration under section 42 would not alter its character as a plaintiff under section 39; and no question of any ambiguity could arise. It does not matter whether the plaintiff specifically asks for cancellation or not. Further, if an instrument is adjudged void so far as the plaintiff is concerned, even though there is no order that it be delivered up and cancelled, still the effect is that so far as the plaintiff is concerned the instrument is cancelled and no longer exists. The suit coming under section 39, an *ad valorem* court fee must be paid.

Assuming, however, that a plaintiff could be read as falling either under section 39 or section 42, then the court fee would be under schedule I or schedule II, respectively, of the Court Fees Act; and according to section 6 of the Court Fees Act the court fee on such a plaintiff must not be less than either the *ad valorem* fee under schedule I or the fixed fee under schedule II. Section 6 clearly indicates that where a document comes under either schedule, the court fee must not be less than what each schedule prescribes, i.e. the court fee must satisfy both schedules.]

Bishan Sarup *v.* Musa Mal, I. L. R., 58 All. ... 146

COURT FEES ACT (VII OF 1870), SECTION 19, CLAUSE xvii—*Exemption from court fee—Petition by prisoner—Application in revision by a prisoner against the acquittal of the opposite party—Not exempt from court fee.*] Section 19, clause xvii, of the Court Fees Act contemplates a petition by a prisoner claiming some relief or indulgence or right on behalf of himself in his capacity as a prisoner. An application filed by a prisoner for revision of an order of acquittal of the opposite party is wholly unconnected with the applicant's condition or status as a prisoner and asks for no relief affecting him in his capacity as a prisoner; it does not fall within section 19, clause xvii and is not exempt from court fee.

Moti Pansari *v.* Usman, I. L. R., 58 All. ... 871

COVENANT RUNNING WITH THE LAND—Whether contract between co-mortgagors against the application of the statutory right of contribution will run with the land ... 548

CRIMINAL PROCEDURE CODE, SECTION 94—Power of criminal court to order a person present in court to produce a document then in his possession ... 364

CRIMINAL PROCEDURE CODE, SECTIONS 99A, 99B, 99D—*Order proscribing a publication as tending to promote hatred and enmity between different classes—Application to set aside the order—Right to begin—Onus of proof—Intention of author not material—Interpretation—Benefit of doubt—Indian Penal Code, section 153A.*] On an application under section 99B of the Criminal Procedure Code for the setting aside of an order of the Local Government under section 99A proscribing a publication, the initial burden of proof is not on the Crown counsel to support the order of the Government, and the language of

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section 99B clearly indicates that it is the applicant who has to make out a case in his favour. Accordingly the applicant's counsel should be allowed to open the case, and have the final right of reply.

Section 99D makes it clear that if the High Court is not satisfied that the publication contains matter of the nature referred to in section 99A, it shall set aside the order of forfeiture. It follows that where a passage is open to two interpretations and the matter is in doubt, the Court would not be satisfied that the matter is of the nature mentioned, and must therefore set aside the order of forfeiture.

Intention of the author to promote hatred or enmity between different classes is not a necessary ingredient of the offence under section 153A of the Indian Penal Code. The addition of the words "or is intended to" in section 99A of the Criminal Procedure Code makes the scope of that section wider than that of section 153A, because "intention" falls short of "attempt" and has in addition been made an alternative ground for proceeding under section 99A in cases where the hatred or enmity may not yet have been actually promoted or even attempted, but is intended. The Local Government may intervene at an early stage as a preventive measure and stop the actual promotion of hatred, etc. These words in section 99A do not make the intention of the author a necessary or material ingredient in cases where the matter comes under section 153A of the Indian Penal Code. Even if a question of intention could arise, such intention must be gathered from the words used, and they themselves would be conclusive; a man must be held to intend the natural consequences of his act.

Where the ethnical origin of a community is sought to be traced by the author of a book, then so long as there is adherence to the historical part of the narrative, however unpalatable it may be to the members of that community, or so long as he is merely relying on certain customs, habits and practices prevailing among that community, there may be no offence under section 153A of the Indian Penal Code. But, on the other hand, where the author uses language which shows malice and attributes to the entire community certain immoral practices and habits, and there is generalisation of offensive remarks on the basis of a few instances and the characterisation of an entire community as possessing certain vices, so as to degrade the members of that community in the eyes of the other classes, the case certainly amounts to promoting feelings of hatred or enmity between classes.

Emperor v. Gupta, I. L. R., 58 All. ... 849

**CRIMINAL PROCEDURE CODE, SECTIONS 118, 120, 426, 498—***Security for good behaviour—Imprisonment for failure to furnish security—Release on bail pending appeal—Power to admit to bail—Time of such release to be excluded from the period of the order requiring security and directing imprisonment in default.* A person who has been ordered to furnish security to be of good behaviour for one year, and on failure to do so has been committed to prison, can, on appeal under section 406 of the Criminal Procedure Code to the Sessions Judge, be ordered by him to be released on bail pending the appeal, in exercise of the powers conferred on him by section 498 of the Code. Section 426 can not apply to such a case, as it applies only where an appeal by a person convicted of an offence is pending. But section 498 confers very wide powers to admit to bail any person who is detained in jail, no matter whether he is a convicted person or not, and no

matter whether he has appealed from a conviction for an offence or has preferred any other appeal allowed by the Code, and even where there is no appeal pending.

The time during which such a person remains out on bail by order of the Sessions Judge is, if his appeal is ultimately dismissed and he surrenders to his bail, to be excluded, on the analogy of the release on bail of persons convicted of offences, from the term prescribed under the order of the Magistrate who bound him over. During that time he has neither furnished the security which was ordered nor been detained in jail in default as directed by the order; it can not therefore be said that during that period the order of the Magistrate has been carried out and has therefore partially exhausted itself. It is noteworthy that section 120(2) of the Criminal Procedure Code merely fixes the date of the commencement of the term of imprisonment, and does not deal with cases where the term has been interrupted by a subsequent order made by an appellate or revisional court.

Emperor v. Masuria, I L. R., 58 All. ... 589

**CRIMINAL PROCEDURE CODE, SECTION 139A—Scope of inquiry—Summary inquiry whether denial of the public right is frivolous or otherwise—Final decision of question of title not aimed at.]** The duty of a Magistrate under section 139A of the Criminal Procedure Code is merely to see whether the denial of the public right is frivolous or not. If the person who denies that right is able to produce some evidence which *prima facie* there is no reason to disbelieve, it is not for the Magistrate to examine evidence on the other side by way of rebuttal and so forth and attempt to arrive at some final decision as to whether the land is or is not public land. Questions of title of this kind are obviously not intended to be decided in summary inquiries before a Magistrate; these are matters which should be left to the decision of the civil court.

Emperor v. Muhammad Khalil, I. L. R., 58 All. ... 739

**CRIMINAL PROCEDURE CODE, SECTION 145, CLAUSES (4), (9)—Summoning of witnesses named by a party—Discretion of court—Duty of court to summon witnesses, not imperative in all kinds of cases—Revision—Substantial justice.]** Sub-section (4) of section 145 of the Criminal Procedure Code has to be read with sub-section (9), which leaves it entirely to the discretion of the Magistrate, in a proceeding under that section, whether he will or will not summon any witness or witnesses, on the application of either party.

There is no general duty upon a court in all kinds of proceedings to issue process to compel the attendance of witnesses desired by the parties; special rules are laid down in the Criminal Procedure Code in this respect according to the nature of the inquiry with which the Magistrate is dealing. Having regard, obviously, to the fact that a proceeding under section 145 is a summary proceeding about the possession of parties, sub-section (9) makes it discretionary to summon or not to summon witnesses.

Even if there were any doubt on this question of law, there would be no ground for interference in revision where the order of the court under section 145, which had been passed after a personal inspection and local inquiry, was substantially just.

Emperor v. Kunj Behari Das, I. L. R., 58 All. ... 920

**CRIMINAL PROCEDURE CODE, SECTIONS 179, 181—Jurisdiction—Place of trial—Criminal misappropriation—Indian Penal Code, section 405—Agent of Cawnpore firm sent to sell goods in Bengal**

*and to remit the money to Cawnpore—Agent absconding and failing to remit the money—No evidence to show where the money was actually misappropriated.]* Section 405 of the Indian Penal Code, which defines criminal breach of trust, falls into two parts. The first part will apply where it is known that the accused has dishonestly misappropriated or converted to his own use the entrusted property at a particular place, and the jurisdiction to try the accused will be at that place. But where it can not be alleged that the misappropriation was actually and definitely committed at any particular place, there the case comes under the second part of section 405, namely dishonestly disposing of the property in violation of any direction of law or of any legal contract; and if the legal contract required that the accused should remit or deliver or otherwise dispose of the property at a particular place, then his failure to do so constitutes the offence, and the jurisdiction to try the accused exists at such place. Hence if there is evidence apart from the fact of non-delivery or non-accounting to show where the misappropriation was committed, the trial may be held at that place; but if there is no evidence to show where the misappropriation was committed, other than the fact of non-delivery or non-accounting according to the contract, then the trial may be held at the place where the accused failed to deliver or to account, because that is where the offence was committed.

So, where the accused was engaged in Cawnpore as an agent of a firm of Cawnpore to sell goods in Bengal and either bring or remit the money to Cawnpore; and the accused made some sales and realised the prices at some places in Bengal but failed to bring or remit the money to Cawnpore; and there was no allegation or evidence that the accused had actually misappropriated or converted to his own use the money by any definite act committed at any particular place: *Held*, that the Cawnpore court had jurisdiction to try him for an offence under section 408/409 of the Indian Penal Code.

Emperor *v.* Mohru Lal, I. L. R., 58 All. ... 644

**CRIMINAL PROCEDURE CODE, SECTIONS 200, 202—***Failure to examine the complainant—Police inquiry into complaint ordered by Magistrate—Dismissal of complaint on police report—Prosecution of complainant for false charge—Jurisdiction.]* The wording of the proviso to sub-section (1) of section 202 of the Criminal Procedure Code makes it clear that the Magistrate has no jurisdiction to direct an investigation by the police into the truth or falsehood of a complaint until he has examined the complainant on oath under section 200. His omission to take this necessary step vitiates the whole of the proceeding.

So, where without examining the complainant on oath the Magistrate ordered a police inquiry and upon receiving the police report dismissed the complaint and directed a complaint under section 182 of the Penal Code to be made against the complainant, it was *held* that the Magistrate's proceedings in directing the complaint to be made were without jurisdiction.

Emperor *v.* Bhagwan Das, I. L. R., 58 All. ... 129

**CRIMINAL PROCEDURE CODE, SECTIONS 208, 347—***Commitment by Magistrate without taking all the evidence for the prosecution—Procedure illegal—Quashing of commitment.]* *Held*, that a Magistrate, who under chapter XVIII of the Criminal Procedure Code is inquiring into a case triable by the court of session or High Court, and to whom, before the prosecution evidence is closed, it appears that the case is one which ought to be tried by the court of session or High Court, is not empowered under section 347 of the Criminal Procedure Code (subject to the production of defence witnesses under section

212) to commit the accused for such trial without completing the rest of the prosecution evidence, and that he is bound to record the rest of the evidence for the prosecution under section 208 of the Criminal Procedure Code and then commit.

Section 347 of the Criminal Procedure Code is controlled by the provisions contained in chapter XVIII of the Code. The section says that the Magistrate shall commit the accused "under the provisions hereinbefore contained" and the reference is to the provisions contained in chapter XVIII.

It is only fair to the accused that the whole of the prosecution evidence should be led in the Magistrate's court as directed by section 208, and unless that is done the accused will hardly be in a position to give a complete list of his witnesses, which he is required to do by section 211 of the Code. It could not have been the intention of the legislature in enacting section 347 to give power to the Magistrate to override this provision for procedure, obviously intended for the benefit of the accused, contained in chapter XVIII.

Emperor v. Asghar, I. L. R., 58 All. ... 671

CRIMINAL PROCEDURE CODE, SECTIONS 235, 236, 237—Charge under one offence and conviction under another—Joinder of a separate charge against some of several persons who are jointly tried under a common charge ... 695

CRIMINAL PROCEDURE CODE, SECTION 239(e)—*Joinder of charges and of persons—Indian Penal Code, sections 457, 460—Whether they are offences "which include theft"—Joint trial of some persons for house-breaking by night with other persons for receiving property stolen thereby, is illegal—Criminal Procedure Code, section 537—Illegality curable if no failure of justice—Criminal Procedure Code, sections 235, 236, 237—Charge under one offence and conviction under another offence—Joinder of a separate charge against some of several persons who are jointly tried under a common charge.* [A house was burgled by night, jewellery was stolen, and two inmates of the house were murdered. Arising out of this occurrence a trial was held at which seven persons were tried together; the first two were each charged with offences under sections 302 and 457 of the Indian Penal Code; the third was charged with an offence under section 460, and the other four were charged with an offence under section 411 as some of the stolen jewellery had been found in their possession. The first two were acquitted of the charge under section 302 and convicted under section 460 though they had not been charged under that section; the third accused was acquitted; and out of the remaining four, two were acquitted and two were convicted under section 411. No objections as to misjoinder had been raised at the trial, but were raised in appeal: *Held*—

From the terms of section 239(e) of the Criminal Procedure Code it is clear that an "offence which includes theft" must mean an offence of which theft is a necessary and essential ingredient. Although theft may frequently follow an offence under section 457, or one under section 460, of the Indian Penal Code, it can not be said that theft or an intention to commit theft is a necessary or essential ingredient of either of those offences. Therefore, persons charged under sections 457 and 460 of the Indian Penal Code are not persons charged with offences which include theft and consequently they can not, by virtue of section 239(e) of the Criminal Procedure Code, be tried with persons charged with receiving stolen property which was stolen in a theft which was committed as part of the transaction involving the said offences, and such joint trial is contrary to law.

But although such a misjoinder of persons at one trial amounts to an illegality and is not a mere irregularity, it is yet curable by section 537 of the Criminal Procedure Code if it has not in fact occasioned a failure of justice. In the present case no objection was raised at the trial, nor was there anything on the record to show that there was any failure of justice.

Although the first two accused were not specifically charged under section 460 of the Indian Penal Code but under section 457, they could properly be convicted under section 460, by virtue of sections 236 and 237 of the Criminal Procedure Code.

Where several persons can properly be charged and tried together under section 239 of the Criminal Procedure Code, e.g. thieves and receivers of the stolen property by virtue of clause (e) of that section, there is nothing to prevent other charges being added against one or more of such persons if the addition of such charges against those persons is permissible by other provisions of the Code, e.g. section 234 or 235.

Emperor v. Mathuri, I. L. R., 58 All. ... 695

CRIMINAL PROCEDURE CODE, SECTION 423(1)(b)—Appellate court ordering accused to be committed to sessions court for trial—Proper procedure thereupon ... 23

CRIMINAL PROCEDURE CODE, SECTION 439—Revision—Substantial justice ... 920

CRIMINAL PROCEDURE CODE, SECTION 476B—*Appeal to District Judge against complaint, or refusal to make a complaint, by a Munsif—Transfer of appeal to Subordinate Judge—Jurisdiction—Civil Procedure Code, section 24—Bengal, Agra and Assam Civil Courts Act (XII of 1887), section 22.* An appeal to the District Judge, under section 476B of the Criminal Procedure Code, from the making of a complaint, or the refusal to make a complaint, by a Munsif in a proceeding under section 476 of the Code, can not be transferred for disposal to a Subordinate Judge.

The transfer could not be authorised by section 24 of the Civil Procedure Code, for even if that section were applicable the transfer could not be made to the Subordinate Judge, inasmuch as he was not competent to try and dispose of such an appeal. Nor could the provisions of section 22(1) of the Bengal, Agra and Assam Civil Courts Act authorise the transfer or confer jurisdiction on the Subordinate Judge; for that section deals with appeals from "decrees and orders" and the making of a complaint or the refusal to make a complaint under section 476 of the Criminal Procedure Code is not an "order", as it does not adjudicate upon any rights of the parties at all; further, the words "decrees and orders" in section 22(1) are meant to refer to decrees and orders passed in proceedings to which the Civil Procedure Code would apply.

Karimullah v. Rameshwar Prasad, I. L. R., 51 All., 344, dissented from.

Shiva Prasad v. Pahlad Singh, I. L. R., 58 All. ... 85

CRIMINAL PROCEDURE CODE, SECTION 488—*Maintenance order—Duration of order—Wife's returning to live with husband does not automatically cancel order—Order enforceable after the wife is again turned out.* A maintenance order passed under section 488 of the Criminal Procedure Code in favour of the wife remains in force until it has been cancelled or modified by the court under section 488(5) or section 489, and the mere fact that after the order the wife went and lived with her husband for some time, until she was turned out by him again, would not automatically cancel or terminate the operation of the order, though it would



suspend the operation for the period during which she lived with her husband. The same order can therefore be enforced by her after such period.

The general principle of law that an order, of which the term is not fixed and of which the currency is not made expressly dependent upon the continued existence of some circumstance or set of circumstances, remains in force until it is cancelled is applicable to maintenance orders passed under section 488 of the Criminal Procedure Code.

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DISTRICT BOARDS ACT (LOCAL ACT X OF 1922), SECTIONS 65, 71, 81, 82—Secretary of District Board dismissed—Non-compliance with statute prescribing mode of dismissal—Remedy—Whether suit lies ....	40
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According to section 4(2) of the U. P. General Clauses Act, 1904, it would appear that the word "act" would include an illegal omission when the word was used with reference to an offence or a civil wrong. It would, therefore, be difficult to hold that the word "act" in section 192 includes all cases of mere omission or refusal on the part of the District Board to perform a private contract, even though

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they do not amount to an illegal omission within the meaning of section 4(2) of the U. P. General Clauses Act. At the same time the view that section 192 of the District Boards Act has no application to suits in contract would, as indicated by the Privy Council, be wrong.

District Board, Allahabad *v.* Behari Lal, I. L. R., 58 All. ... 569

DUTY OF COURT REGARDING SUMMONING OF WITNESSES, *See* Criminal Procedure Code, section 145, clauses (4), (9) ... 920

**EASEMENT**—*Customary right—Public right—Right to offer prayers in another person's land—Dedication as mosque or wakf—Presumption from long user—Easements Act (V of 1882), sections 2, 18.* A right to perform religious worship over the land of another may depend on a grant, or be acquired as a private easement by the owner of a dominant tenement. But in addition to such individual rights, a right of worship may also be acquired as a customary right, or may be claimed as a part of a public right, which would be a right vested in an entire community. The latter, under section 2 of the Easements Act, is excepted from the operation of that Act.

If a person holds a mere license, he is not entitled to vary the user so as to claim a higher right than what was granted; so, where there is merely a right to perform worship or offer prayers on a piece of land, he would not be entitled to put up a building on it for the purpose of performing worship or prayers therein. But where a mosque or a temple has stood on a piece of land for a long time and worship has been performed in it by the public all that time, and the terms of the original grant of the land are not now ascertainable, there would be a fair presumption that the site on which the mosque or temple stands is dedicated property and consecrated land and that the building does not stand there merely by the leave and license of the owner of the site. There is nothing legally objectionable in the owner of a land making a grant of the site to persons of a different community and creed and then allowing them to consecrate that site by building a place of worship on it; there can be no objection to such a building being changed from katcha to pucca later on; it is no longer a case of a mere license.

Miru *v.* Ram Gopal, I. L. R., 58 All. ... 121

**EASEMENTS ACT (V OF 1882), SECTIONS 2, 18**—Act does not apply to a public right to offer prayers on a piece of land ... 121

**EASEMENTS ACT (V OF 1882), SECTIONS 5, 13**—*Continuous easement—Flowing sewage water from plaintiff's house along drains in defendant's house.* An easement consisting of a right to flow sewage water from latrines in plaintiff's house along drains in the defendant's house or land is a continuous easement.

The definition of an easement in section 4 of the Easements Act as a right to do and continue to do something on the servient tenement makes it clear that the "act of man" mentioned in the definitions of a continuous easement and a discontinuous easement in section 5 has reference to an act which has to be done on the servient tenement. The sewage water comes into existence by act of man done on the dominant tenement, but so long as the water flows in the plaintiff's land there is no exercise of easement; it is only when the water enters the defendant's drain that the exercise of easement begins but thereafter there is no act of man and the water flows along the defendant's drain by force of gravity, unless the drain has been obstructed.

Brijmohan Lal *v.* Hazari Lal, I. L. R., 58 All. ... 662



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EVIDENCE ACT (I OF 1872), SECTION 92— <i>Oral evidence varying terms of sale deed—Evidence that the sale consideration actually agreed upon was less than that stated in sale deed—Distinction between a "term" of the sale and a recital of receipt of consideration.</i> Where a part of the sale consideration is on the face of the document still outstanding and to be paid by the vendee, it is not open to him to produce evidence to show that there was a separate contemporaneous oral agreement that this sum would not be payable and was merely fictitious. The amount of sale consideration is a term of a deed of sale, and by section 92 of the Evidence Act no evidence of any oral agreement can be admitted, as between the parties to the deed of sale or their representatives, for the purpose of varying the amount. The acknowledgment of receipt of the whole or part of the sale consideration in a deed of sale is not a term of the deed of sale, and oral evidence may be given to show that the amount acknowledged or any part of it was not received. By trying to show that the recital is wrong the party is merely trying to show that he made a wrong admission of a fact, whereas by attempting to show that the amount promised to be paid was different he is attempting to alter one of the conditions in the deed which still remains to be fulfilled.	
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FRAUD—Damages—Liability of estate of deceased perpetrator of fraud

—Survival of cause of action—Succession Act (XXXIX of 1925), section 306—*Maxim*, *Actio personalis moritur cum persona*—

Measure of damages—Merger of cause of action—Companies Act (VII of 1913), section 235—Award, in misfeasance proceedings, of damages against manager or auditor, etc. for fraud does not bar suit for damages against private persons who also contributed to the fraud.] *B* was the managing agent of a company. *R* was a shareholder and a businessman with whom contracts were placed by the company for the supply of materials, and *M* was his agent. *B* embezzled certain sums of money, aggregating Rs.39,750, belonging to the company, and then persuaded *M* to help him in concealing the embezzlement from the auditors by *M* executing false receipts covering the amounts and purporting to be payments or advances for materials about to be delivered by *R*. *M* executed the false receipts knowing they would deceive the auditors by hiding the embezzlement, but he was not a participant in the embezzlement itself. A few years later the company went into compulsory liquidation, in the course of which misfeasance proceedings were held and *B* and the auditors were ordered to pay various sums as damages; but little or nothing could be recovered from *B*. Before the order was passed against the auditors, the present suit had been filed by the liquidators and was pending against the heirs of *R* deceased and against *M* for recovery of the loss of Rs.39,750 caused to the company by the fraud of *M* which prevented the prompt discovery of the embezzlement; that order directed the auditors to pay a sum of about Rs.20,000 as well as the Rs.39,750 mentioned above, but deferred and limited the execution in respect of the latter amount only to such part thereof as might not be realised from *M* and the heirs of *R* on the decree in the suit which might be passed against them. The auditors obtained leave to appeal to the Privy Council against the order, and thereafter the matter was compromised with the leave of the court, the liquidators accepting a cash payment from the auditors of Rs.18,000, beyond which there was no expectation of any further recovery, in full satisfaction of their claim.

*Held*, (1) As the false receipts were given by *M* acting as the agent of *R*, and within the scope of his employment, the principal *R* would be equally liable as *M* himself to the company for the loss caused to it by the fraud of *M*.

(2) The cause of action against *R* for this loss did not die with the death of *R*, but survived against his estate. This was shown by the provisions of section 306 of the Succession Act. A liability of this kind did not come within the exception contained in the section. The phrase "personal injury" in the exception is intended to mean injury to a person's reputation, mind or body, as distinguished from injury to property; acts which directly give rise to mental or physical suffering or inconvenience come under the exception.

The common law maxim, *actio personalis moritur cum persona*, is no longer regarded in England as one of general application; and in India it has been very largely abrogated by statutory provisions contained in section 306 of the Succession Act.

(3) The cause of action for the present suit cannot be deemed to have become merged in, or the suit to be barred by, the orders which were passed in the misfeasance proceedings. Proceedings under section 235 of the Companies Act may be described as domestic proceedings between the company and its officers and the orders are passed in a special jurisdiction investing the court with certain powers over the internal affairs of the company. If sufficient sums had been recovered under those orders the present defendants might have escaped liability, wholly or in part, upon the ground that the loss had disappeared or had diminished; but there could be no question of disappearance of a cause of action, as there had been no suit brought on it.

The compromise could not be interpreted to mean that the loss to the company had been satisfied.

(4) The embezzlement of Rs. 39,750 was not the result of the fraudulent receipts; they were executed long after the embezzlement was completed. The measure of damages in the present suit was, therefore, not necessarily Rs. 39,750. The liability was only for the loss which directly arose by reason of the embezzlement not being brought to light at the time when the audit took place. It was therefore necessary to ascertain what part of the Rs. 39,750 could have been recovered from B if, but for the false receipts, the embezzlement had been discovered at the audit and measures promptly taken to recover the money.

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GHATIAS—Bathing ghat in Benares—Nature of right of the ghatias, <i>See</i> Bathing Ghat ...	818
GIFT— <i>Specific purpose—Subsequent impossibility of carrying out the purpose—Failure of gift—Conditional gift—General charitable intention absent.</i> A gift was made of certain land to the Secretary of the Hindu Dharam Sewak Mandal for the express purpose of being used as the site of an <i>ashram</i> to be built for imparting training to young Hindu religious reformers; the circumstances did not disclose a general charitable intention. During several years the Mandal did nothing in the way of building the <i>ashram</i> and ultimately the Mandal ceased to exist, having been absorbed by the Hindu Maha Sabha. After the death of the donor his son sued to recover the land:	

*Held*, that where a land is given for a specific purpose, and for a specific purpose only, then such gift becomes a nullity if the performance of that purpose is rendered impossible. Such a gift is a conditional one; if the performance of the condition becomes impossible, the gift never really takes effect.

In the present case the land having been given not with a general charitable intention but for a specific charitable purpose, namely the erection of an *ashram* by the Hindu Dharam Sewak Mandal, and that purpose having become impossible to carry out by reason of the said Mandal having ceased to exist, the gift failed and the land reverted to the donor or his heirs. It would not be a performance of the donor's expressed purpose if the Hindu Maha Sabha, in which the Mandal had become absorbed, were to build an *ashram* on the land.

Harish Chandra *v.* Hindu Dharam Sewak Mandal,  
I. L. R., 58 All. ... 687

**GUARDIANS AND WARDS ACT (VIII OF 1890), SECTION 7—Guardian appointed by will—Probate not obtained—Application for certificate of guardianship—Whether maintainable.]** Where a person has been appointed guardian of a minor under a will, it is not necessary for him to take out probate of the will as a condition precedent to the maintainability of an application by him under the Guardians and Wards Act to be appointed guardian of the minor, and the court must consider and decide the application on the merits.

Ganeshji Pande *v.* Bhagirathi, I. L. R., 58 All. ... 832

**GUARDIANS AND WARDS ACT (VIII OF 1890), SECTIONS 34(c), (d) AND 34A—Powers of court in respect of investigation of accounts given by guardian** ... 721

**GUARDIANS AND WARDS ACT (VIII OF 1890), SECTION 41(3) AND (4)—Powers of court in respect of accounts delivered by ex-guardian—Detailed inquiry or investigation not contemplated—Remedy of ex-minor by suit—Order for payment of a sum found due after investigation ultra vires—Revision—Jurisdiction—Discharge to ex-guardian—Effect of discharge—Guardians and Wards Act, sections 34(c), (d) and 34A.]** The correct interpretation of section 41(3) of the Guardians and Wards Act is that the Act does not contemplate a detailed inquiry by the court into the matter of accounts delivered by the ex-guardian of a ward who has attained majority, but only a summary investigation. After the cessation of minority the ex-ward has of course the right to bring a suit against the ex-guardian for rendition of accounts; and it is clear therefore that no duty has been cast nor power conferred on the court to make detailed inquiry or investigation into the accounts delivered by the ex-guardian under section 41(3). If the court makes a detailed investigation and as a result thereof arrives at a certain sum as being due from the ex-guardian and orders him to pay it, the order is without jurisdiction and a revision lies, the order not being appealable under section 47.

A consideration of section 34(c) and (d) of the Act points to the same conclusion as to the intention of the Act regarding the scrutiny of the guardian's accounts. Accounts are exhibited under section 34 while the ward is a minor and the powers of the guardian have not ceased; and many legal difficulties which would otherwise arise are avoided, and there is no real difficulty, if all that the court does is to look into the accounts in a summary manner and see that the guardian has not incurred any expenditure which was prohibited by the court and has generally acted according to the directions given by the court. The auditor appointed under section 34A will be of some assistance to the court in order to check the accounts in the above light. If the accounts are unsatisfactory or if the guardian disobeys any directions given under section 34(d) the court has ample powers under sections 35 and 36 to sanction a suit by a proper person and relief can be given to the minor, and under section 37 the general liability of the guardian as trustee is preserved.

*Held*, further, without deciding the question whether a discharge given to the ex-guardian under section 41(4) would or would not have the effect of preventing a suit against him by the ex-minor, that the proper thing for the court, upon an application for discharge, is to give notice to the ex-minor, and if any objections are raised by him which *prima facie* appear to the court to be of some substance, to refuse the discharge and direct the ex-minor to obtain redress by a suit.

Misra Rangnath v. Misra Murari Lal, I. L. R., 58 All.

721

HINDU LAW—*Adoption—Jains—Custom—Jain widow can adopt to her husband without anybody's permission or consent—Extent of estate taken by such adopted son—Agreement that adoptive mother is to remain in possession during her life—Validity—Widow's motive for adoption immaterial where she has an unfettered right to adopt—Proof of a custom well recognized by courts—Judicial notice.*] According to a well established and recognized custom among the Jains, a widow can adopt without authority from her husband or permission of his kinsmen. This right of the widow is quite independent of the nature and extent of the rights acquired by her in her husband's estate, and the son adopted by her succeeds to all the property, ancestral as well as self-acquired, of her deceased husband.

A deed of agreement under which the adoptive mother was to remain in possession of the property during her life time was valid and did not affect the validity of the adoption. Custom had sanctioned such arrangements postponing the interest of the adopted son to the widow's interest, even though it should be one extending to a life interest in the whole property.

Where the widow has in herself an unfettered power to adopt without any person's permission, an inquiry into her motives for making an adoption would be purely irrelevant.

A custom that has been repeatedly brought to the notice of the courts and has been recognized by them regularly in a series of cases attains the force of law and it is no longer necessary to assert and prove it by calling evidence.

Banarsi Das v. Sumat Prasad, I. L. R. 58 All. ... 1019

HINDU LAW—*Alienation by father—Suretyship for payment of money—Mortgage of joint ancestral property by father as security for due payment of rent under a lease taken by him of certain property—Lease not executed for legal necessity—Antecedent debt.*] Where the father in a joint Hindu family took a lease of a village for nine years at an annual rent of Rs.2,700, and three months afterwards executed a mortgage of joint ancestral property for Rs.8,000 by way of security for the due payment of the rent; and it was found that the transaction was not supported by legal necessity or benefit to the estate:

*Held* that in these circumstances, and if there was no antecedency of the original debt or liability in point of time and in fact, the hypothecation of joint ancestral property by way of security was invalid.

*Held*, also, on the question of antecedent debt,—

(1) If the execution of the lease and the subsequent execution of the security bond were part and parcel of the same transaction, then obviously there could be no antecedent debt in point of time or fact.

(2) [*Per* SULAIMAN, C.J.; BENNET, J., concurring; BAJPAL, J., *contra*] If, however, the two transactions were separate and independent, the first would be antecedent in point of time. If the pecuniary liability incurred under the lease was certain,

definite and unconditional, it would amount to a debt, even though the payment was to be by future instalments. But if under the terms of the lease the pecuniary liability were not only contingent but also conditional, and might accrue in certain contingencies and might not accrue in others, then the legal liability would not amount to the incurring of a debt.

(3) The Mitakshara puts suretyship as something distinct and different from debts. Even in those classes of suretyship in which the Hindu law makes the liability binding on the heirs of the surety it is the sons only and not the grandsons who are so declared liable; to hold that the father could make a valid alienation of the family property on account of his suretyship obligation, without there being an antecedent debt, would mean that the liability was binding on the grandsons also. The liability of the sons to pay a debt is not the same thing as the right of the father to alienate the property to discharge the debt. The validity of an alienation in discharge of an antecedent debt is an exception to the general rule of want of authority in the father to transfer property without legal necessity or benefit to the estate, and the exception should not be extended to the case of a suretyship where no antecedency in point of time and fact exists.

Bharatpur State *v.* Sri Kishan Das, I. L. R., 58 All. 804

HINDU LAW—Antecedent debt—Taking a lease and subsequently mortgaging family property as security for due payment of the annual rent under the lease ... 804

HINDU LAW—Compromise between a Hindu widow and next reversioner, under which he takes a part of the property absolutely for himself and his heirs—Validity ... 1041

HINDU LAW—Daughters' estate—Joint estate of two daughters—Mortgage by one daughter of her share how far effective—U. P. Land Revenue Act (Local Act III of 1901), sections 111, 233(k)—Estoppel—Equitable liability on account of benefit to estate.] On the death of a Hindu his two daughters jointly succeeded to the estate. As the estate was at that time in the possession of others, a suit had to be filed by the daughters for recovery of possession. One of the daughters, T, hypothecated her half share in the estate and borrowed money required for the suit; the other daughter, H, was not a consenting party to the mortgage, nor was any representation made by her which might have misled the mortgagee. After the daughters' suit had succeeded and they had obtained possession, the mortgagee brought a suit on his mortgage and in execution of the decree purchased T's half share in the estate. He then applied for partition of that share in the revenue court. H objected that the purchaser had no share inasmuch as the mortgage by T was invalid; H was directed to file a suit in the civil court to have this question of title decided, but she failed to do so and consequently her objection was disallowed and the partition was effected. Some time later T died, and then H sued the purchaser for possession of T's half share on the ground that it had come to H by survivorship: Held that H was entitled to succeed.

Where a Hindu dies leaving two daughters, they succeed as joint tenants with a right of survivorship. The two daughters collectively are, in a legal sense, one heir to their father. If they act together they can burden the reversion with any debts contracted owing to legal necessity, but one of them acting without the authority of the other can not prejudice the right of survivorship by burdening or alienating any part of the estate. The position of daughters in this respect under the Hindu law is the same as that of widows.



As there had been no representation on the part of *H* which might have misled the other party and induced him to change his position to his prejudice, there was no reason for saying that *H* was in any way estopped from making the claim to *T*'s share by right of survivorship. The mere fact that she in some measure had benefited from the loan taken by her sister, which partly financed the litigation by which they recovered possession of the estate, was no reason for preventing her from questioning the transaction of mortgage by *T*.

The suit was not barred by the provisions of section 233(k) of the Land Revenue Act. No doubt *H* did not institute the suit in the civil court which she was directed to do; but she could not, at that time when her sister was alive, have filed any effective suit and obtained any present relief against the alienation made by the sister of her half share. The most that could be said in respect of the decision under section 111 of the Land Revenue Act was that it might be *res judicata* that *H* was not entitled to recover *T*'s share during the latter's life time; that decision did not prevent *H* from recovering the share after *T*'s death.

Chhattar Singh v. Hukum Kunwar, I. L. R., 58 All. ... 391

HINDU LAW—Marriage—Gotra—Change of woman's gotra on marriage—Widow does not revert to her father's gotra—Remarriage of widow with a person of her father's gotra—Validity.] Upon her marriage a Hindu woman passes out of her father's gotra into her husband's gotra. When she becomes a widow she retains this latter gotra and does not revert to her father's gotra. The widow can, therefore, validly marry a second husband who may be of her father's gotra.

Radha Nath Mukerji v. Shaktipado Mukerji, I. L. R., 58 All. ... 1053

HINDU LAW—Marriage—Mitakshara school—Vaishyas—Abandonment of wife—Right of abandoned wife to re-marry—Custom—Marriage in sagai form—Intermarriage in sub-castes—Validity of marriage of Kasaudhan with Agrahri woman.] The Shastras do not contain any injunction forbidding marriage between persons belonging to different sub-divisions of the same *Varna* nor is there any general principle which can be invoked in support of such prohibition. A marriage between a Kasaudhan and an Agrahri woman is, therefore, not invalid merely because they belong to different sub-castes.

Where it has been established that by custom the abandonment of a wife by her husband dissolves the marriage tie, the woman abandoned may, during the life of the husband who has abandoned her, contract a valid marriage with another in the sagai form.

Inderun Valungypooley Taver v. Ramasawmy Pandia Talaver, 13 Moo. I. A., 141, and Ramamani Ammal v. Kulanthai Natchear, 14 Moo. I. A., 346, referred to.

Gopi Krishna Kasaudhan v. Musammat Jaggo, I. L. R., 58 All. ... 397

HINDU LAW—Remarriage of widows—Forfeiture of interest in first husband's estate—Custom of remarriage in a particular caste—No forfeiture where custom existed prior to Act XV of 1856—Proof of custom—Instances may be referable either to the Act or to ancient custom—Hindu Widows' Remarriage Act (XV of 1856), section 2.] In order to escape the operation of section 2 of the Hindu Widows' Remarriage Act, 1856, by which the widow upon remarriage forfeits her interest in her first husband's estate, it must be established that in the community or caste to which she belonged there already existed an ancient custom of remarriage of widows prior to the passing of that

Act, as distinguished from a practice which might have come into existence since the passing of that Act. Instances of remarriage of widows in any community after 1856 might well be referable to the provisions of that Act and would not necessarily be indicative of an ancient custom existing before the passing of that Act. It must be shown that the present practice is in pursuance of such an ancient custom and not one which has grown up under the Act.

Bhola Umar v. Kausilla, I. L. R., 58 All. ... 1034

HINDU LAW—Succession—Sister, *See* Hindu Law of Inheritance (Amendment) Act, section 2 ... 1041

HINDU LAW OF INHERITANCE (AMENDMENT) ACT (II OF 1929), SECTION 2—*Applicability where the Hindu male died before passing of the Act—Sister's succession—Hindu law—Compromise between a Hindu widow and next reversioner under which he takes a part of the property absolutely for himself and his heirs—Family settlement—Interpretation of statutes—Preamble.* An agreement or compromise was entered into between a Hindu widow in possession of her husband's estate and three nearest reversioners who had brought a suit impugning a deed of gift executed by her; she was also claiming an absolute title under an alleged will. Under this agreement the donee gave up his rights under the deed of gift, and a part of the estate was put in immediate possession of the three reversioners as belonging to them and their heirs absolutely, and it was provided that the rest of the property would, after the widow's death, also belong to them absolutely:

*Held* that the agreement was not binding, either as a compromise or as a family arrangement, on the person who became entitled to succeed, as the actual next reversioner, on the death of the widow. If the two parties, namely the widow on the one side and the collaterals on the other, had both been claiming title to the estate and a right to immediate possession, it could then have been said that there was a *bona fide* dispute between the parties which could be settled under a family arrangement. As the reversioners were merely challenging the validity of the deed of gift and not claiming any immediate title in themselves, they could not by means of the agreement partition the property and acquire an absolute interest for themselves and their own heirs to the exclusion of the actual reversioner who might be entitled to succeed on the death of the widow. In this transaction these collaterals were not representing the entire body of reversioners—indeed they were acting adversely to the interest of the actual reversioner—, nor did the actual reversioner derive title from them; the agreement, therefore, could not be binding on him.

*Held*, also, that where the succession opened out after the coming into force of the Hindu Law of Inheritance (Amendment) Act of 1929 a sister could take advantage of the provisions of the Act and claim inheritance although the last male owner had died previous to the coming into operation of that Act. Such a case is not one of giving "retrospective effect" to the Act. So, where the Act came into force between the death of a Hindu male and that of his widow who succeeded him, his sister is entitled, in the absence of any nearer heir, to succeed on the widow's death.

The preamble to an Act can no doubt be looked at where the section is ambiguous, and it supplies a key to the mind of the legislature and indicates what its intention was; but where the language of the section is clear, the preamble cannot control its provisions.

Rajpali Kunwar v. Sarju Rai, I. L. R. 58 All. ... 1041



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INCOME-TAX ACT (XI OF 1922), SECTIONS 4(1), 4(3)(ii), AND 6—*Association in the nature of a "mutual concern"—Incorporated under section 26 of Companies Act—Members' entrance fees and subscriptions—Receipt of commissions on sales by or through members—Liability to income-tax—Income, profits or gains—Business—Other sources—"Charitable institution"—"Object of general public utility".*] An association of merchants of the town of Hapur was registered as a company under section 26 of the Companies Act; it was limited by guarantee, had no share capital, did not exist for earning profits and was prohibited from declaring dividends. The objects of the company were to promote trade and commerce, particularly that of grain and cotton dealers of Hapur, to settle business disputes among them, etc., and also to spend certain sums on charitable objects or objects of public utility. The income consisted of the members' entrance fees and annual subscriptions, as well as a registration fee for each grain-pit and a commission on purchases and sales on forward contracts by or through the members. The company was assessed to income-tax in respect of its income from the registration fees and commissions, but not from the entrance fees and subscriptions paid by the members; and its claim to a deduction on account of certain expenditure on charity towards the maintenance of a hospital was disallowed.

*Held*, on a case stated by the Commissioner of Income-tax regarding the assessment of the company to income-tax—

(1) An association incorporated under section 26 of the Companies Act as a company limited by guarantee, not existing for earning profits, and prohibited under the law from declaring any dividends to its members, is not as such exempt from income-tax and is liable to be assessed to income-tax.

(2) The income derived from the members in the shape of the registration fees and the commissions was not income from any "sources other than business" and did not fall under class (vi) of section 6 of the Income-tax Act. The Commissioner of Income-tax having held that it was not income from "business" and no question on this point having been referred to the High Court, no opinion was expressed as to whether the Commissioner's view was or was not correct.

(3) The company was not a "charitable institution" within the meaning of section 4(3)(ii) of the Income-tax Act and was not as such exempt from income-tax. The ostensible object of the company was to provide facilities of trade and to improve business and this did not come within the phrase "charitable purpose" as defined in the section. As the persons who were benefited were those particular individuals who were members of the association or such outside merchants as elected to do business through the members, it was very doubtful whether it could be said that an object of "general public utility" as contemplated in the definition was being advanced by the company. Every institution whose object is to benefit the public or a section of the public is not necessarily "charitable". Further, there must be an element of altruism before an institution can be held to be "charitable", i.e. the beneficiaries must not be able to claim the benefit; that element was wanting in the present case.

(4) The company could not, apart from other considerations, claim any exemption or deduction *quoad* any money it might have elected to spend on charity.

Chamber of Commerce, Hapur v. Commissioner of Income-tax, I. L. R., 58 All. ... 1003

INCOME-TAX ACT (XI OF 1922), SECTIONS 13, 31, 37—Whether an assessment can legally be based on private inquiries made without the knowledge of the assessee, *See* Income-tax Act, section 23(3) and (4) ... .. 200

INCOME-TAX ACT (XI OF 1922), SECTION 23(3) AND (4)—*Return of income incorrect and incomplete—Failure of assessee to produce evidence—Assessment, basis of—"Evidence"—Private inquiries not authorised—Assessment of previous year can be relied on—Income-tax Act, sections 13, 31, 37.* A return of income submitted by an assessee was found to be inaccurate and incomplete. Notice under section 23(2) of the Income-tax Act was issued and accounts called for; certain accounts were submitted which were found to be meagre and unreliable. Fresh notice under section 23(2) was issued, calling upon the assessee to attend and explain certain matters relating to the accounts and to furnish further information, but nothing was done by the assessee. Assessment was then made under section 23(3), the estimate being based *inter alia* on private inquiries made by the Income-tax Officer as to the extent of the assessee's money lending business, and on the assessment for the previous year which was a "best judgment" assessment under section 23(4). On appeal, the Assistant Commissioner of Income-tax made, in his turn, some private inquiries as to the extent of the money lending business, and reduced the assessment:

*Held*, (BAJPAT, J., *contra*), that the Income-tax Officer, or the Assistant Commissioner, was not authorised under section 13 of the Income-tax Act or otherwise to make private inquiries and to take the result of such inquiries into account in making the assessment; and the assessment, in so far as it was based on the private inquiries, was not based on such evidence as the Income-tax Officer or Assistant Commissioner was in law empowered to act upon.

*Held* also, (NIAMAT-ULLAH, J., *contra*), that the assessment for the previous year, even though it was a "best judgment" assessment made under section 23(4), was certainly some evidence on which the Income-tax Officer or Assistant Commissioner was in law entitled to proceed in making the assessment. As the assessee failed to produce satisfactory evidence, he failed to displace the previous year's estimate, which was certainly admissible against him.

There is an essential difference between cases in which action is taken under section 23(3) and those under section 23(4). Where the Income-tax Officer acts under section 23(3) the assessment must be based on "evidence". If the evidence adduced by the assessee is not accepted, or if the assessee does not produce any evidence, the Income-tax Officer must have recourse to other evidence on which to base his assessment; and for this purpose he has ample powers under section 37 to call for evidence. The word used is "evidence", and not some other word like "information". The evidence may not be such as fulfils all the technical requirements as to admissibility, relevancy, etc., of the Evidence Act; but mere conjecture, surmise or assumption of a fact does not amount to evidence within the meaning of section 23(3). *Prima facie* the evidence should be taken in the presence of the assessee or within his knowledge in order that he may be able to meet such evidence. The result of private inquiries made in the absence of and without notice to the assessee is certainly not evidence within the meaning of section 23(3).

On the other hand section 23(4) makes an entirely different provision. Here there is no question of the Income-tax Officer taking any further evidence nor is there any necessity for him to take any evidence at his own instance. No appeal lies in

this case, whereas an appeal lies from an assessment under section 23(3); and obviously there ought to be a difference between the two cases as to the availability to the appellate authority of the materials on which the assessment is founded.

[*Per NIAMAT-ULLAH, J.*—Where there is nothing to show that a "best judgment" assessment under section 23(4) was based on any known data, it is no better than a conjecture, surmise or assumption and is not "evidence" within the meaning of section 23(3).]

[*Per BAJPAI, J.*—Sections 37(c), 13, and 31(2) of the Income-tax Act show that proceedings before Income-tax authorities are not judicial proceedings for all purposes; that when the method adopted by the assessee has been rejected by the Income-tax Officer, the latter is entitled to adopt a different basis and a different method; and that the power given to the Assistant Commissioner to make such further inquiry as he thinks fit is not fettered by any limitations. It is therefore clear that the Evidence Act with all its details does not apply in the case of an assessment under the Income-tax Act, and a margin of approximation is undoubtedly left to the Income-tax authorities, especially when the assessee has been guilty of contumacy. The private inquiries, therefore, were authorised in this case. According to the principles of natural justice, however, it is not permissible to take the result of such private inquiries into account in making the assessment without giving an opportunity to the assessee to meet them and to displace the Income-tax Officer's estimate. In the present case opportunity after opportunity was given to the assessee.]

Gopinath Naik v. Commissioner of Income-tax, I. L. R., 58 All. ... .. 200

**INDIAN AND COLONIAL DIVORCE JURISDICTION ACT, 1926** (16 AND 17 GEO. 5. CH. 40)—*Petition for divorce—Court fees.*] The court fee payable on a petition for divorce under the Indian and Colonial Divorce Jurisdiction Act of 1926 is Rs.2. The court, in hearing such a petition, does not apply the Indian Divorce Act, and, therefore, the court fee applicable to that Act can not be applied to a petition under the Indian and Colonial Divorce Jurisdiction Act of 1926.

Smurthwaite v. Smurthwaite, I. L. R., 58 All. ... 259

**INDIAN PENAL CODE, SECTION 153**—"Illegal act"—*Depressed classes riding in palanquins through a hill village—Objection by high caste Hindus—Local practice—Police officer's order to dismount from palanquin—Order unauthorised—Police Act (V of 1861), section 31—Scope of section—Apprehension of riot.*] Section 31 of the Police Act is intended primarily for the purpose of keeping order on public roads, preventing confusion, regulating traffic and avoiding obstruction. The section cannot empower every police officer, whether a police inspector or a constable, to issue orders prohibiting the doing of otherwise legal acts simply because he apprehends that a breach of the peace would be committed by other persons if the persons ordered not to do the legal acts persisted in doing them. The section does not authorise a police officer to issue an order which only a Magistrate might have issued under section 144 of the Criminal Procedure Code, to refrain from doing a perfectly legal act.

A bride and bridegroom, *doms* by caste, were about to be carried in palanquins through a hill village in Kumaun, and objections were raised by the high caste Hindus of the village that depressed class people were never permitted to ride in palanquins through the village, that the palanquins should be carried empty and the bride and bridegroom should walk. The *qanungo*, who in Kumaun has the status of circle inspector

of police, and who had been directed to be present, apprehending a possible breach of the peace, intervened and ordered that the palanquins should be carried empty. Certain persons, in disobedience of this order, put the bride and the bridegroom into the palanquins and had them carried through the village. These persons were thereupon convicted under section 153 of the Indian Penal Code. The criminal courts found that there was a local practice against depressed classes riding in palanquins through the village. *Held*, that the conviction under section 153 was bad, as the accused had not done anything which was illegal; riding in palanquins through a village was not an act illegal in itself, nor had any civil court held that there was any village custom having the force of law which prevented people of depressed classes from doing so in the village, and which the accused could be said to have transgressed. Disobedience of the qanungo's order was not an illegal act, as he had no authority to issue the order.

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JURISDICTION—Execution court questioning whether property directed by the decree to be sold is saleable under the law—Pensions Act (XXIII of 1871), sections 4, 11, 12—Suit for sale on mortgage—Objection by one defendant that property was non-transferable pension, overruled and suit decreed—Decree <i>ex parte</i> as against another defendant—Latter objecting in execution court that property was non-saleable pension—Res judicata—Principle of constructive res judicata how far applicable in execution proceedings.] In a suit for sale on a mortgage one of the mortgagors defendants raised the objection that the mortgaged property was non-transferable pension within the meaning of section 12 of the Pensions Act, 1871; but the court found against this objection and decreed the suit. The decree was <i>ex parte</i> as against another mortgagor defendant who had not appeared in the suit; but he appeared in the execution court and objected to the sale of the property on the ground that it was non-saleable pension within the meaning of section 11 of the Pensions Act:	

*Held* (RACHPAL SINGH, J., *dubitante*) that the objection could be raised and the execution court had jurisdiction to entertain it.

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The question was not whether the court passing the decree had jurisdiction to pass it; even if its decision that the property was validly mortgaged was erroneous, that would not make the decree a decree passed without jurisdiction. The question that arose was whether the court executing the decree could sell the property; it was open to the present objector to raise that question, and the execution court could not refuse to hear evidence to prove that the property which it was directed by the decree to sell was one the sale of which in execution was prohibited by section 11 of the Pensions Act.

The decision, in the suit itself, of the question whether the property could be mortgaged did not bar the raising in the execution court of the objection as to non-saleability of the property under section 11 of the Pensions Act; section 11 had not been pleaded in the suit, nor could it be pleaded at that stage; so, the question of saleability in execution was not directly and substantially in issue in the suit itself. Again, that decision was not as against the present objector, who did not contest the suit; and it could not operate as *res judicata* against him except by applying the principle of constructive *res judicata*, which principle was not applicable to execution proceedings. Further, it could not be said that he might and ought to have raised the objection in the suit itself; on the contrary he would be estopped from derogating from his own mortgage by pleading that the property was not transferable. There was no such estoppel against his objecting to the saleability of the property in execution.

*Per RACHHPAL SINGH, J.*—The question sought to be raised in the execution court, as to whether the property was a pension within the meaning of the Pensions Act and therefore not saleable, was substantially the same as had been already raised and decided in the suit itself and should, therefore, be no longer open to be raised in execution; but inasmuch as the decree was passed *ex parte* against the present objector he could apparently, under the authority of the Full Bench ruling in *Katwari v. Sita Ram Tiwari*, I. L. R., 43 All., 547, raise the question in the execution court.

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*Act (Local Act III of 1926), section 221—Lambardar's decree against co-sharer for share of revenue—Execution sale of the share and purchase by lambardar—Whether he gets priority over a previous mortgagee decree-holder on the ground that land revenue is the first charge on the land.]* Section 141 of the Land Revenue Act is not intended to apply to a decree-holder under section 221 of the Agra Tenancy Act. It is only in the case of proceedings for an arrear of revenue taken under the Land Revenue Act that section 141 of that Act will apply. The land revenue is a first charge on the land as laid down in section 141 when the revenue is payable to Government and proceedings are taken under section 146 of the Act for its realisation, or when the Collector takes proceedings under section 184 of the Act on behalf of a lambardar. Where the lambardar himself brings a suit against a co-sharer under section 221 of the Agra Tenancy Act for realisation of revenue and in execution of the decree purchases the co-sharer's share, he gets no priority by virtue of section 141 of the Land Revenue Act as against the holder of a previous mortgage decree against that share.

Mallhe Khan v. Gulab Singh, I. L. R., 55 All. ... 718

LEGAL REPRESENTATIVES—No representative character *inter se*—One heir in possession of part of the assets of the deceased does not represent the other heirs or the whole assets ... 594

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LIMITATION ACT (IX OF 1908), SECTION 19—Acknowledgment—*"Person through whom he derives title"*—Acknowledgment by mortgagor not binding on a mortgagee who derived title prior to the acknowledgment—Transfer of Property Act (IV of 1882), sections 52, 74, 92—Subrogation—Third mortgagee paying off first mortgage after second mortgagee's decree—Fresh period of limitation does not accrue—*Lis pendens*—*Vakalatnama* giving name of one vakil but signed by another who was in fact appointed—Formal defect immaterial.] Where there is an acknowledgment by a mortgagor, that acknowledgment can only bind a mortgagee who derives his title subsequent to the acknowledgment, but it can not bind a mortgagee who derived title prior to the acknowledgment. The words, "person through whom he derives title", in section 19 of the Limitation Act mean a person through whom he has derived title after the date of the acknowledgment. So, an acknowledgment of the first mortgage contained in the deed of third mortgage can not operate as against the second mortgagee.

The payment by a third mortgagee of the amount due on the first mortgage to the first mortgagee subrogates him to the rights of the first mortgagee but does not give him a fresh period of limitation, as from the date of such payment, for enforcing the rights under the first mortgage.

Where, after the second mortgagee has obtained a decree for sale on his mortgage, a third mortgage is made and the third mortgagee pays the amount due on the first mortgage to the first mortgagee, the third mortgagee is prevented by section 52 of the Transfer of Property Act from claiming priority in

respect of the first mortgage as against the second mortgagee decree-holder.

Where a vakalatnama was signed by the vakil who was intended to be appointed by the client, and such vakil acted for the client, but it was found that the body of the vakalatnama did not contain the name of this vakil but that of another vakil, it was held that this formal defect was immaterial and that the vakil had validly acted on behalf of the client.

Ram Sarup v. Sahu Bhagwati Prasad, I. L. R., 58 All. 912  
**LIMITATION ACT (IX OF 1908), SECTION 20—Payment of interest "as such"—Payment by debtor without any specification whether it was towards interest or principal, and appropriated by creditor towards interest—Whether limitation saved thereby—Interpretation of statutes—Words, ignoring of—Civil Procedure Code, order VII, rule 6—Ground other than the one pleaded for exemption from limitation—Limitation Act, section 19—Acknowledgment.]** Held by the Full Bench (THOM and BAJPAL, JJ., *contra*) that where money is paid by a debtor without specifying whether the payment is towards interest or towards principal, leaving it to the option of the creditor to appropriate it as he likes, and the creditor appropriates it wholly towards interest due, there is neither a payment of interest as such nor a part payment of the principal within the meaning of section 20 of the Limitation Act.

The words "paid as such" in the first paragraph of section 20 necessarily imply that the interest must have been paid professedly as interest at the time of payment, i.e. the debtor must have paid the amount with the intention that it should be paid towards interest and there must be something to indicate that intention; the mere appropriation by the creditor of the payment to interest can not take the place of such an indication. A mere unspecified payment of money, which subsequently by the act of the creditor becomes a payment of interest, is not payment of interest "as such" within the meaning of section 20.

The fact that the legislature had considered it necessary to have two separate paragraphs in section 20, dealing respectively with the payment of interest and part payment of principal, and that the language and the provisions in respect of them were distinct, clearly indicates that the words "as such", used in connection with the one but not with the other, are of special significance and not in any way superfluous. The meaning and importance which had been attached to these words by the Courts must have been accepted by the legislature, inasmuch as no alteration was thought necessary to be made in the language of the first three paragraphs of the section when it was reproduced in the Act of 1908, showing thereby that the words "as such" were not regarded as purposeless or redundant.

The only difference which the amendment of 1927 has made is in the proviso to section 20, and it is that the handwriting of the person making the payment is now necessary for both the payments mentioned in the section, and not only for part payment of the principal as before. But this extension of the necessity to have a writing in case of both the payments does not in any way imply any radical change in the substantive section itself, which the legislature has left untouched; it is not intended to affect and can not affect the meaning and significance of the words "as such" which had been accepted and adhered to by the legislature. Nor is there anything in the amendment which would necessarily render the words superfluous, anomalous or absurd. All the words of the section ought to be given their proper meaning and no words should be considered to be superfluous unless there is no other possible option.



The law of limitation imposes certain arbitrary time limits on suits; and there may not be any clear principle of equity underlying such restrictions, which are entirely a matter of policy. The interpretation of sections in such an enactment has to be made strictly according to the language employed, and not on a consideration of what ought to be the law.

[*Per THOM, J.*—When a debtor makes a payment, without specifying whether it is towards interest or towards principal, then it is reasonable to infer that he intends the payment to be towards interest, and the court, in the absence of any evidence to the contrary, is entitled to hold that the payment is a payment towards interest.

[The payment was either towards interest, or was part payment of principal, or partly towards interest and partly towards principal; and whichever be the case, a fresh period of limitation would begin to run under section 20 from the date of payment.

[The words "as such" in the section appear to be redundant. A payment of interest is a payment of interest, and it is no more a payment of interest if the words "as such" are added. Any other interpretation would lead to the absurd result that though the payment made without specification *must* either be towards interest or towards principal or partly towards both, it will not give a fresh start to limitation. According to rules of interpretation of statutes it is permissible to ignore or reject words which are redundant or which lead to an absurd result. There is no reason for giving the same meaning, as might have been given prior to the amendment of 1927 by which the legislature intended to put payment towards interest and part payment of principal on exactly the same footing, to the words "as such" in the amended section if thereby the intention of the legislature is defeated or a palpable absurdity results.]

[*Per BAJPAL, J.*—The plaintiff in his plaint stated that the payment was made by the debtor towards interest as such. If the court holds that it was not a payment of interest as such, then it would be wrong, while rejecting this part of the plaintiff's admission, to pin him down to the other part of it, namely the implied admission in the plaint that he appropriated the amount towards interest. If it was not a payment of interest, it must obviously be taken as part payment of principal. The section does not require a part payment of principal to be made "as such". A fresh period of limitation would therefore run from the date of the payment.

[The plaintiff having mentioned one ground of exemption from the law of limitation in the plaint, namely that the payment was of interest as such, was not debarred by the provisions of order VII, rule 6 of the Civil Procedure Code from obtaining exemption from limitation on some other ground established on facts, namely that the payment must be taken to be a part payment of principal. There would be no prejudice to the defendant in this case by allowing the plaintiff to allege that the payment should be considered as part payment of principal.

[After the amendment of 1927, payment of interest and part payment of principal are intended to stand on the same footing, and the words "as such" have now lost much of their former importance and significance.]

*Held*, also, by the Full Bench, that the endorsement on the back of the bond of the payment of Rs.50 on a particular date, without any further specifications or details, did not operate as an acknowledgment within the meaning of section 19 of the

Limitation Act.

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LIMITATION ACT (IX OF 1908), ARTICLE 116— <i>Breach of warranty of title and covenant for quiet possession—Sale by manager of joint Hindu family—Sale set aside on suit by sons—Vendee deprived of property—Suit for refund of price and compensation—Limitation—Terminus a quo—Whether from decree of first court or of appellate court.</i> Joint Hindu family property was sold by the manager, with an express covenant for title and quiet possession under which the vendees would be entitled to compensation if any sort of defect was found in respect of the share sold and it was interfered with. Upon a suit by the sons the sale was set aside, for want of legal necessity, in January, 1924, and they obtained delivery of possession against the vendees in February, 1924. An appeal by the vendees to the District Judge was dismissed in January, 1926, and a second appeal to the High Court was dismissed in October, 1928. In June, 1930, the vendees sued the vendor for refund of the price and damages, basing their claim on the breach of covenant:	
<p><i>Held</i> that the suit was barred by limitation under article 116 of the Limitation Act, and the six years' period under that article began to run from the breach of the contract, which took place when defect of title was found and possession was interfered with as the result of the decision of the first court. The plaintiffs' cause of action was complete when the first court found that the vendor had no power to sell and the vendees were dispossessed. The decree of the trial court remained operative throughout the litigation, which was carried up to the High Court, and the subsequent affirmance of the decree on appeal could not give a fresh starting point for limitation.</p>	
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MUHAMMADAN LAW— <i>Family custom at variance with Muhammadan law of succession—Converts to Muhammadanism—Family custom of following Hindu law of succession—Bengal, Agra and Assam Civil Courts Act (XII of 1887), section 37.</i> Notwithstanding the provisions of section 37 of the Bengal, Agra and Assam Civil Courts Act, 1887, a family custom of succession being governed by the Hindu law, and not by the Muhammadan law, in the case of a Muhammadan family whose ancestors were converts from Hinduism several centuries ago, can be proved and will prevail.	

In Islam itself there are several sects, and the law of inheritance is not identical for all. Section 37 of the Bengal, Agra and Assam Civil Courts Act cannot, therefore, be interpreted as laying down that any particular rules of Muhammadan law should be enforced. Obviously the section means that in matters of succession, inheritance, etc., the parties when they are both Muhammadans should be governed by their personal law. A family custom which affects the personal law

of the parties, even though not in accordance with the strict Muhammadan law, can be allowed to be proved.

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MUHAMMADAN LAW—*Relinquishment of future right of inheritance—Validity—Relinquishment in lieu of gift in praesenti of other property—Family settlement—Estoppel—Contract not to claim a future inheritance—Transfer of Property Act (IV of 1882), section 6(a).* Under the Muhammadan law a relinquishment or renunciation of a future right of inheritance is not in itself valid so as to be binding upon the maker in the sense that the estate passes to the person in whose favour the relinquishment is made.

But an expectant heir may have so acted as to estop himself from claiming the inheritance when it falls due. The question of estoppel is a question under the Contract Act and the Evidence Act, and not one strictly under the Muhammadan law. If the relinquishment is not in the nature of a gift or transfer of a contingent right, but is merely a contract for not claiming a contingent right of inheritance when succession opens in future, then the case would not be affected by section 6(a) of the Transfer of Property Act; such a contract, made for consideration, by an expectant heir is not in any way illegal. It would, of course, be a matter of discretion for the court to enforce or to refuse specific performance of such a contract. In cases where the agreement has been effected not for a monetary consideration merely, but in a form which makes it impossible for the court to grant adequate compensation to the aggrieved party, the agreement may well be enforced and the heir be held bound by it.

So, where two documents of even date were executed, one being a deed of wakf of a part of his property by a Muhammadan in favour of his second wife by which he appointed her as the mutwalli and made her sons the beneficiaries, and the other being a deed by which the wife relinquished her dower as well as her claim to any future inheritance in the rest of the estate of her husband; and during the life time of the husband possession was obtained and enjoyed by her of the wakf property; and after the husband's death she sued for a share by way of inheritance in the estate of her husband: It was held that the plaintiff could not be allowed to go back upon her relinquishment which was part of a family settlement between the husband and the wife, binding on the parties. Under the family settlement the plaintiff had been in possession of the wakf property for several years, and she could not now be allowed to resile from her previous position and claim the inheritance, as it was not possible to grant her such relief by making her pay adequate compensation to the defendants.

*Latafat Husain v. Hidayat Husain*, I. L. R., 58 All. 834.

MUHAMMADAN LAW—*Wakf—Mussalman Wakf Validating Act (VI of 1913), section 2(1)—What property can be made a wakf of—Right and interest of a grove-holder.* The definition of wakf as given in section 2(1) of the Mussalman Wakf Validating Act, 1913, shows that any property, whether movable or immovable, can be made a wakf of, provided there is a permanent dedication of it. The definition is quite general in its character and would certainly include a wakf of full grove-holder's rights over which the grove-holder has a permanent dominion, although he is not the proprietor of the land; the subject-matter of the wakf need not necessarily be the full proprietary interest in immovable property. The rights of a grove-holder as now recognized by the Tenancy Act are not rights of a temporary character; the grove can be maintained, by replacing old fallen trees by new ones, and in that way the land can retain its character as a grove for ever.

and be in the possession and enjoyment of the grove-holder and his heirs and transferees. There seems to be nothing even in the strict Muhammadan law against the dedication of such permanent rights which amount to a permanent occupation of the land and full proprietary rights over the trees.

Amir Ahmad v. Muhammad Ejaz Husain, I. L. R., 58 All. 464

**MUNICIPALITIES ACT (LOCAL ACT II OF 1916), SECTION 97**—*Written contract between Municipal Board and a contractor to execute unspecified repairs and constructions as might be ordered by municipal engineer during one year—Validity—Whether a separate written contract for each item of work necessary.* A written contract, signed by a contractor as well as by the chairman and the executive officer of a Municipal Board, was entered into, by which the contractor undertook to execute such repairs and constructions as might be ordered by the municipal engineer from time to time during the period of one year; he was to be paid at the rates enumerated in the schedule of rates sanctioned by the Municipal Board; and on failure to carry out any such order he would forfeit the security deposit and the contract would be annulled. Details or specifications of the items of works that might be ordered by the municipal engineer during the said period were not given in the contract:

*Held*, (SMITH, J., *contra*) that the contract fulfilled the requirements of section 97 of the Municipalities Act and was valid, although it did not specify and detail the various items of work that might be required to be done. In the case of such a contract the provisions of section 97 did not require that if any of the items of work ordered to be done exceeded Rs.250 in value a separate written contract for each such item was to be entered into.

Municipal Board, Agra v. Ram Lal, I. L. R., 58 All. 1069

**MUNICIPALITIES ACT (LOCAL ACT II OF 1916), SECTIONS 184(2), 186, 209**—*Separate sanction necessary for constructions projecting over street or drain—General sanction to the building not sufficient—Private ownership of drain immaterial—Municipalities Act, sections 307, 318, 321—Notice to remove or stop construction—No appeal made to District Magistrate, challenging lawfulness of notice—Notice can not be questioned in criminal court.* Under section 180 of the Municipalities Act the Chairman of a Board can only accord a general sanction for the erection or re-erection of a building, but where such erection or re-erection involves the making of any constructions contemplated by section 209, the provision of section 184(2) comes into operation and makes it incumbent to obtain a separate sanction in respect of them under section 209, and such sanction can be given only by the Executive Officer.

The operation of clause (b) to section 209(1) of the Municipalities Act is not confined to public drains alone, and any person wishing to make a structure or projection over a private drain is also bound to obtain permission under that section, if the drain lies in a street as defined in the Act. The question of his title to the drain is quite immaterial in this respect.

The words "notice given under the provisions of this Act" in section 307 of the Municipalities Act mean that the notice in question should not merely profess to be under the Act but should have been given in compliance with the provisions of the Act. As a rule, therefore, a criminal court trying a charge under section 307 would be entitled to satisfy itself that the notice satisfies this condition. Section 318, however, lays down a special provision in the case of certain notices specified therein and in this respect controls the provisions of section 307. It

follows, therefore, that where the notice which is the subject of a charge under section 307 happen to fall within one of the classes of notice provided for in section 318, the criminal court is prevented from entering into the question of its legality by virtue of the special provisions of the latter section. According to these provisions the only method by which a person aggrieved by a notice falling within the purview of section 318 can challenge the validity of that notice is by way of an appeal to the District Magistrate or other special officer appointed by the Local Government, and, if he fails to avail himself of that remedy, no other authority such as a criminal court trying a case under section 307 can question the validity of the notice. The legislature having provided a complete remedy by sections 318 and 319 against illegally issued notices of the classes enumerated in section 318, it deliberately ousted the jurisdiction of any other court or tribunal in that matter. *Emperor v. Har Prasad*, I. L. R., 54 All., 861, followed.

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NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), SECTION 80— <i>Promissory note—Interest not mentioned—Right to interest—Date from which interest is to be allowed—Contract Act (IX of 1872), section 25(3)—Promise to pay time barred debt—Whether the promise must specifically mention the time barred debt—Promissory note in lieu of time barred debt plus fresh advance—Negotiable Instruments Act, section 44.]</i> A promissory note, payable on demand, was executed for Rs.900. There was no mention in it about any interest to be paid; nor was there any specification or reference to any items of consideration making up the Rs.900. In the suit brought on this note it transpired that the consideration was made up of Rs.500 on a former time barred promissory note, about Rs.200 interest on that sum although that promissory note mentioned no interest nor was any oral agreement to pay interest proved, and Rs.200 fresh advance in cash: <i>Held</i> that the plaintiff was entitled to recover Rs.500, the amount of the former promissory note, but no interest thereon, plus the Rs.200 cash advance together with interest on the aggregate Rs.700 at 6 per cent. simple from the date of institution of the suit.	

According to section 80 of the Negotiable Instruments Act, where no rate of interest is specified in a promissory note or bill of exchange, then notwithstanding any agreement relating to interest to the contrary the interest is to be calculated at the rate of 6 per cent. per annum, and the date from which such interest should be calculated should be the date on which the

principal amount ought to have been paid, that is, it became payable. The word "same" in the section should be understood to refer to the amount due on the instrument and not to the interest on that amount.

Where the amount on an instrument is payable immediately, there can be no doubt that the interest is to be calculated from the date of execution. But where the amount becomes payable only on demand, or at or after sight or presentation, it can not be said that the principal "ought to have been paid" on the date of execution; and therefore the interest should not be calculated from that date. No doubt it is not necessary for a plaintiff to make any previous demand of payment before instituting his suit on the basis of a promissory note, and the suit can not fail for want of a previous demand; nevertheless the amount can not be said to have been payable until the demand is made, and in this case the demand is not considered to be made until the suit is filed; accordingly the interest has to be calculated from the date of the suit.

The clause, in section 80 of the Negotiable Instruments Act, "notwithstanding any agreement relating to interest between any parties to the instrument" applies not only as regards the rate at which interest is to be calculated but also as regards the date from which such interest is to be calculated. So, in the present case, even if any private agreement to pay interest had been proved, interest at 6 per cent. would have to be calculated only from the date of the suit.

Where there is not merely a promise to pay a time barred debt, but there is a novation of contract under which fresh consideration passes from the promisee and there is on the part of the promisor the receipt of such consideration as well as a promise to pay a time barred debt, the two taken together would amount to a valid agreement, although the previous debt had been barred by time. A fresh contract of this kind is in no way illegal or void; the mere inadequacy of the consideration can not affect the validity; nor can it be said that any part of the consideration was either absent from the beginning or had subsequently failed, within the meaning of section 44 of the Negotiable Instruments Act.

*Semble*, where there is nothing but a mere promise in writing to pay a time barred debt, a specific reference to such debt is necessary in order that the promise may become operative under section 25(3) of the Contract Act.

Nath Sah v. Durga Sah, I. L. R., 58 All. ... 382

OATHS ACT (X OF 1873), SECTIONS 6, 13—*Child witness—No exemption from oath or affirmation—Omission to take oath—Deliberate omission to administer oath—Criminal Procedure Code, section 423(1)(b)—Appellate court ordering the accused to be committed for trial—Procedure—Fresh proceedings under chapter XVIII not contemplated.* If a child of tender years fulfils the criterion for a witness laid down by section 118 of the Evidence Act, i.e. he is able to understand the questions put to him and to give rational answers to them, then it is obligatory on the court, under section 6 of the Oaths Act, to administer oath or solemn affirmation to him. The Oaths Act does not recognize any criterion that oath or affirmation may be dispensed with because the child, being of tender years, can not understand its significance, although he is sufficiently grown up to be able to understand, and give rational answers to, questions put to him.

Where the court deliberately refrained from administering oath or solemn affirmation to a child witness on the ground that the child could not understand the nature and significance



of an oath, the defect was cured by section 13 of the Oaths Act. That section covers both accidental omissions and intentional omissions to administer oath or affirmation.

[*Per* SULAIMAN, C.J.—There may be extreme cases, e.g. where a court defies the law, and knowing that the law requires an oath or solemn affirmation to be given to an adult witness deliberately omits to administer it or prevents the witness from making it, in which case it may be difficult to say that such an act was a mere omission within the meaning of section 13 of the Oaths Act. Again, where parties agree to abide by the statement on oath of a referee, it can not be contended that an omission to administer oath to the referee would be cured by section 13.]

Under section 423(1)(b) of the Criminal Procedure Code, in an appeal from a conviction the appellate court may, *inter alia*, order the accused person to be committed for trial. The section does not require that the appellate court, when doing so, should order the Magistrate to commit the accused for trial. It is, therefore, open to the appellate court either itself to commit the accused for trial to the sessions court or to direct a Magistrate to commit him for trial. Where it adopts the latter course, it does not give the Magistrate any jurisdiction to make any further inquiry and possibly arrive at the conclusion that there are no materials for a commitment. The trial already held is sufficient for the purpose of chapter XVIII of the Code, and it is not necessary for the Magistrate to hold an inquiry *de novo* and follow the provisions of all the sections in that chapter. The only thing for the Magistrate to do is to frame a charge or an amended charge under section 210 of the Code, to take the list of witnesses under section 211 and even to take witnesses for the accused under section 212 and then to make a formal order of commitment under section 213.

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PARTNERSHIP ACT (IX OF 1932), SECTIONS 69, 74(b)—*Suit by unregistered firm against third party—Not maintainable—Immaterial whether the right enforced by suit accrued before or after commencement of the Act—Subsequent registration of firm does not cure the defect—General Clauses Act (X of 1897), section 6(e).* Held, (SULAIMAN, C.J., *dubitante*) that a suit by an unregistered firm against a third party, filed after the coming into force of section 69 of the Partnership Act, is barred by that section, and section 74(b) of the Act does not operate to save the suit even if the right sought to be enforced by the suit is one which had accrued prior to the commencement of the Act.

*Held*, also, *per* BENNET, J., that the registration of the firm subsequent to the filing of the suit did not cure the defect.

*Held*, *per* SULAIMAN, C.J., that section 6(e) of the General Clauses Act applies to those cases only where a previous law has been simply repealed and there is no fresh legislation to take its place.

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PENSIONS ACT (XXIII OF 1871), SECTIONS 4, 11, 12—Decree for sale of mortgaged property—Objection in execution that property is non saleable pension. *See* Jurisdiction ... 98

**PENSIONS ACT (XXIII OF 1871), SECTIONS 6, 11, 12—Political pension**  
*—Suit by an heir against other heirs for share of pension inherited from ancestor—Collector's permission—Compromise decree—Relinquishment of claim to share of pension and of estate in lieu of monthly sum charged on ancestor's estate in defendants' hands—Whether such relinquishment valid and a lawful consideration—Compromise decree enforceable against heirs of original defendants—Family arrangement.]* With the permission of the Collector, obtained under section 6 of the Pensions Act, a suit was brought for a declaration that the plaintiff, as an heir of an ancestor who had a political pension of Rs.65 per month from Government, was entitled to a certain share thereof. The defendants, who were the other heirs and in receipt of the pension, denied the legitimacy of the plaintiff. The suit was compromised on the terms that the legitimacy of the plaintiff was recognized; that he relinquished all claims to any share of the pension or of the estate of the deceased ancestor, and that in lieu thereof he was to receive a monthly payment of Rs.50, generation after generation, which was charged against a part of the estate of the deceased ancestor in the hands of the defendants. The compromise was filed in court and a decree was passed in accordance therewith. Some years later, after the death of the original plaintiff, his heirs brought a suit for arrears of the monthly payment against the former defendants and the heirs of some of them who had died. The questions arose whether the compromise decree was valid under the Pensions Act and whether it could be enforced against heirs of the original defendants. The nature of the pension in question, though not clearly established, was assumed throughout all the stages of the litigation to be that of a political pension to which section 12 of the Pensions Act would be applicable, and the decision was given on that basis:

*Held* that the compromise and the decree based on it were legal and valid.

[*Per* SULAIMAN, C.J.—The offer made by the plaintiff in the former suit, to abandon his claim to the pension as well as to the estate to which he might be entitled, being made in a pending suit which had been instituted after obtaining the certificate of the Collector and which was in every way cognizable by the civil court, was not unlawful or invalid. Section 12 of the Pensions Act declares to be void all private transfers, assignments, etc. voluntarily made by the person entitled to any pension mentioned in section 11; it does not govern decrees of courts passed under section 6; the word "orders" in section 12 must mean payment orders made by such a person. An abandonment of the claim and of the right to have it tried by the court would not in itself amount to an assignment of any share in the political pension, but merely the withdrawal of the suit in lieu of the consideration offered. Such a course is not obnoxious in any way to the provisions of section 12 or any other section of the Pensions Act.]

[*Per* BENNET, J.—The relinquishment of the former plaintiff's right to the pension would be null and void within the meaning of section 12. That part of the consideration for the defendants' agreement was void, but not an unlawful consideration within the meaning of sections 23 and 24 of the Contract Act, and the other part of the consideration, namely the relinquishment of the right to the estate, being valid the compromise was valid and binding.]

*Held*, also, that as the compromise was in the nature of a family arrangement in settlement of a *bona fide* dispute between the members of the family and was embodied in the decree of a competent court, and it was intended that the monthly allowance would be payable out of the estate of the



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deceased in the hands of the defendants, it was binding on and enforceable against the heirs of the original defendants, to the extent to which that estate of the deceased was in the hands of these heirs.	
Ahmad Ali Khan v. Riyasat Ali Khan, I. L. R., 58 All.	230
POLICE ACT (V OF 1861), SECTION 31—Scope of the section, <i>See</i> Indian Penal Code, section 153	934
PRACTICE AND PLEADING—Appellant wishing to raise a point of law the opposite of which was urged by him and adopted by the lower court—Special leave to appeal should not be granted in such circumstances, <i>See</i> U. P. Town Improvement (Appeals) Act, section 3(1)(b)	758
PRACTICE AND PLEADING—New plea in second appeal, which was not clearly taken before	413
PRACTICE AND PLEADING—Suit between parties to a fraudulent sale deed, created to defeat a right of pre-emption—Defendant entitled to plead joint fraud and expose true character of the transaction	847
PRELIMINARY DECREE FOR SALE—Suit not terminated—Adjustment or compromise of suit thereafter	565
PRESCRIPTIVE RIGHT—Can not be acquired by individuals as against the rights of the public in land dedicated to public use	818
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PRESUMPTION—Whether loan given by undischarged insolvent was from money belonging to himself or from money which should lawfully have vested in the receiver	137
PRIVACY, RIGHT OF—Customary right—General custom of province—Judicial notice—Not necessary to allege and prove existence of such custom in the locality—Evidence Act (I of 1872), section 57. It is well established and recognized that a customary right of privacy exists generally in these provinces, and it is open to a court to take judicial notice under section 57 of the Evidence Act of the general prevalence of such a custom having the force of law. It is, therefore, not necessary that such custom should be alleged and proved by evidence produced in each case to establish it.	
Bhagwan Das v. Zamurrad Husain, I. L. R., 51 All., 986, disapproved.	
Nihal Chand v. Bhagwan Dei, I. L. R., 58 All.	370
PRIVILEGED COMMUNICATION—Lawyer and client, <i>See</i> Evidence Act, sections 126, 162	364
PROBATE COURT—Function of.—Questions of title or interpretation arising after grant of probate and in course of administration of the estate—Jurisdiction.] After probate has been granted it is not the function of the probate court to decide questions of title, or of interpretation of the will, arising in course of administration of the estate by the executor; they are matters which should be decided in a regular suit.	
In the matter of the estate of Alice Skinner, I. L. R., 58 All.	22
PROMISSORY NOTE—In lieu of, though not mentioning, a time barred debt, plus a fresh advance—Validity	382
PROVINCIAL INSOLVENCY ACT (V OF 1920), SECTIONS 5, 75—Creditor's petition for adjudication dismissed—Death of debtor pending creditor's appeal in district court—Order of district court that case should proceed against debtor's legal representatives—Whether appeal lies—Revision—Civil Procedure Code, sections 4, 115.] A creditor's petition for adjudication of a debtor as	

an insolvent was dismissed, and the creditor appealed to the District Judge. During the pendency of the appeal the debtor died, and the District Judge ordered, under section 17 of the Provincial Insolvency Act, that the proceedings should continue against the legal representatives of the deceased debtor. Against this order the legal representatives filed an appeal in the High Court:

*Held*, that a clear distinction was drawn between a "decision" and an "order" by section 75(1) of the Provincial Insolvency Act, and as by the second proviso an appeal was allowed only against a decision of the district court, the present appeal, which was only against an interlocutory order passed in the course of the appeal pending in the district court, did not lie.

*Held*, further, that the order could not be interfered with in the exercise of revisional jurisdiction. The powers conferred by the first proviso to section 75(1) would be exercisable if the order had been an order made by the court below in an appeal decided by it, but no appeal had yet been decided by the court below. Nor were the powers conferred by section 115 of the Civil Procedure Code exercisable; for, the powers given to High Courts by section 5(2) of the Provincial Insolvency Act were expressly subject to the provisions of that Act, and as that Act specifically provided by section 75 for appeals and revisions in a particular manner, any action taken under section 115 of the Civil Procedure Code would be in contravention of the provisions of that Act. Further, according to section 4 of the Civil Procedure Code, inasmuch as the Provincial Insolvency Act was a special law its provisions could not, in the absence of any specific provision to the contrary, be affected in any way by the Civil Procedure Code.

Wali Muhammad v. Hingan Lal, I. L. R., 58 All. ... 639

PROVINCIAL INSOLVENCY ACT (V OF 1920), SECTIONS 28(4) AND (5); 53(d)—*Undischarged insolvent's suit to recover loan—Maintainability—Question whether the money lent was property which had vested in the receiver—Presumption—Receiver should be made party to the suit.* Under the provisions of section 28, clauses (2) and (4), of the Provincial Insolvency Act, property acquired by or devolving on the insolvent after the adjudication as well as property existing at the time of adjudication stand on the same footing and both vest forthwith in the court or the receiver, as the case may be; although under the English law some distinction has been drawn between the two, in respect of transactions made by the insolvent.

There is no specific provision in the Provincial Insolvency Act under which a suit by an undischarged insolvent is, in express terms, prohibited. Where, however, the property in dispute in a suit brought by an undischarged insolvent is admitted to be vested, or is of such a nature that it must vest in the receiver, the receiver alone is the proper person to institute suits and proceedings in respect of it, according to section 53(d) of the Act; and the suit brought by the insolvent behind the back of the receiver would be defective.

But where a loan was advanced by the insolvent after his adjudication, and he brings a suit for its recovery, it does not necessarily follow that the money given by the insolvent was property which had vested in the receiver. The insolvent might be a mere benamidar on behalf of an undisclosed principal and the suit would be for the benefit of the real owner; or the loan might have been given out of accumulated savings from such items of property as do not vest in the receiver according to section 28(5) and remain the property of the insolvent himself. It is not appropriate that the defendant who took the

money should be allowed to deny that the money belonged to the plaintiff. As a matter of fact there is a presumption in favour of the plaintiff that the money was his own, inasmuch as the receiver had not intervened and seized this amount. Unless, therefore, the defendant definitely established that the money had, in fact, vested in the receiver, the suit can not be thrown out on the mere ground that the plaintiff is an undischarged insolvent. The appropriate course would be to implead the receiver in the suit or at least give him notice of the action so that he may show, if he can, that the property was such as had vested in him, in which case he can take the benefit of the decree and recover the amount thereof.

Abdul Rahman v. Nihal Chand, I. L. R., 58 All. ... 132

PROVINCIAL INSOLVENCY ACT (V OF 1920), SECTION 38—*Insolvent's proposal for a composition—Acceptance by the prescribed majority of creditors is a condition precedent to the court's considering the proposal—Court cannot sanction proposal in the absence of such acceptance by creditors.* Where an insolvent submits, under section 38 of the Provincial Insolvency Act, a proposal for a composition in satisfaction of his debts, the acceptance of the proposal by a majority in number and three-fourths in value of the creditors, as prescribed by clause (2) of the section, is a condition precedent before the court can proceed to consider the proposal. A composition in its essence is an agreement; and unless the proposal of the insolvent is duly accepted by the creditors in the manner laid down by clause (2) there is no agreement; and consequently there is no proposed composition before the court for its consideration and either approval or refusal. Therefore, in the absence of acceptance by the creditors as prescribed by clause (2), the court cannot approve the proposal for composition.

Shankar Lal v. Ali Ahmad, I. L. R., 58 All. ... 655

PUBLIC RIGHTS—Bathing ghat dedicated to public use—Ghatias occupying specific portions of ghat—Invasion of rights of the public ... 818

PUBLIC RIGHT—Right to offer prayers in another person's land—Dedication as mosque or wakf may be presumed from long user ... 121

PUBLIC SERVANT—*Tenure of office—Dismissal at pleasure—Cause of action—Right of suit—Master and servant—Secretary of District Board—Statute prescribing mode of dismissal not complied with—Suit not maintainable—Remedy by appeal to Local Government—District Boards Act (Local Act X of 1922), sections 65, 71, 81, 82—Specific Relief Act (I of 1877), section 42.* A District Board passed a special resolution abolishing the posts of the Secretary and the Engineer and creating a new combined post of Secretary-Engineer; the services of the Secretary were accordingly dispensed with and the Engineer was appointed to the new post; the Secretary, however, received his salary for the next four months. The resolution was not one passed by such a majority as is laid down by section 71 of the District Boards Act. The ex-Secretary brought a suit against the District Board and the Secretary of State for a declaration that the resolution was void and his dismissal wrongful, and for damages:

*Held* that the suit was not maintainable. A District Board servant is under the general disability of other public servants in that he holds his office "during pleasure", and he can not sue the District Board or the Secretary of State in a court of law for wrongful dismissal; nor can he sue for a declaration that the resolution removing him is null and void, as such a declaration would not come within the scope of section 42 of the Specific Relief Act nor could it lead up to any consequential relief which the court would be competent to grant.

According to section 89 of the District Boards Act, 1922, the Secretary is a public servant; and section 71 entitles a Board to dismiss its Secretary at pleasure. He holds office during the pleasure of the Board, just as any other public servant of the Crown in India holds office during His Majesty's pleasure. The provisions of section 71, regarding the kind of resolution and the extent of majority by which a Board can dismiss its Secretary, are merely the prescribed mode of expression of the pleasure of the Board; the dismissal is yet a dismissal at pleasure, because no cause for dismissal has to be assigned.

Any irregularities or non-compliance with rules in connection with the order of dismissal of a public servant, whose office is terminable at pleasure, would not give him a cause of action or right of suit in a court of law, either for damages or specific performance or an injunction. The only remedy of the plaintiff would be to appeal to the Local Government, as provided by section 82 of the District Boards Act. The powers of the Board are exercised subject to the general control of the Local Government, and it is for the Local Government in its discretion to compel the Board to exercise those powers in a proper manner.

If the plaintiff's claim to damages was based upon a contract, then by section 65 of the District Boards Act it would have to be a written contract in order to be binding on the Board; moreover, it would have to contain an express term against the power of dismissal at pleasure; there was no such contract in the present case. A resolution of the Board appointing a Secretary can not take the place of a written contract; moreover, the resolution does not set out any conditions of the service and of its termination.

As regards the general law of master and servant, even if the plaintiff did come under it, all that he would be entitled to claim would be reasonable notice or salary in lieu thereof; the four months' pay received by him would be ample in lieu of notice.

[*Per* BENNET, J.—The resolution terminating the plaintiff's services was not one of dismissal, and therefore the procedure prescribed by section 71 was not necessary; the resolution was one of combination of two offices and the appointment of one person to discharge the duties of both offices, under section 81.]

[*Per* ALLSOP, J.—The resolution amounted to an order of dismissal, within the scope of section 71. The Secretary was dismissed, as a necessary consequence of the combination of the two offices, which were to be held by the Engineer.]

Roshan Lal Geswala v. District Board, Aligarh.  
I. L. R., 58 All. ... .. 40

RAILWAYS—Negligence—Allowing grass to grow high on railway land close to the rails—Grass set on fire from running engine, and fire catching on to tall grass on plaintiff's neighbouring land and his haystacks and trees—Contributory negligence—Negligence apart from breach of any statutory duty—Railways Act (IX of 1890), section 13.] On the track of a railway dry grass, two feet high, was standing on the land between the rails and the fencing; across the fencing was the plaintiff's land, on which tall grass, six feet high, was standing close up to the fencing; part of the grass in that part of his land which was distant from the fencing had been cut down and stacked. The grass on the railway land caught fire, either due to sparks from a running engine or to live cinders falling from the ash-pan of the engine, and the fire spread on to the plaintiff's land, burning down the standing grass, the stacks and some trees.

The plaintiff sued the railway for damages. It was not alleged or proved that the construction or the working of the engine was in any way defective or improper.

*Held*, that if allowing the easily combustible grass to remain on the railway land in the close vicinity of the rails, exposed to the risk of catching fire from sparks or live cinders from engines, was negligence on the part of the railway, the plaintiff was guilty of contributory negligence in not taking sufficient precaution by way of making and maintaining a fire line for the protection of his property or even by way of cutting and removing that part of his grass which was in the vicinity of the fencing, though he was fully cognisant of the risk of the railway grass catching fire from sparks or live cinders and then spreading it on to his own grass next to the fencing; the plaintiff, therefore, could not recover damages from the railway.

On the question whether there was actionable negligence on the part of the railway, *held*—

[*Per* BENNET, J.—Section 13 of the Railways Act, which provides for the imposition of certain duties and precautions on railways, makes no mention of any duty to cut the grass on the banks of the railway lines. There being no statutory duty on the railway to cut the grass, the non-cutting thereof is not an actionable negligence.]

[*Per* SULAIMAN, C. J.:—The enumeration of the precautions mentioned in section 13 is not in any way exhaustive. Though there is obviously no statutory duty on a railway to cut all grass from the railway track, yet this may be a reasonable precaution which the railway should take; and failure to take due care and caution to prevent injury would amount to actionable negligence. Each case must depend on its own circumstances, and it is for the court to decide whether dry grass has been allowed to remain on the railway track so close to the rails and so high in stature as to amount to negligence which makes the railway liable.]

Bombay, Baroda and Central India Railway *v.* Dwarka Nath, I. L. R., 58 All. ... .. 771

RAILWAYS—Negligence—Sparks from engine setting fire to goods in railway shed ... .. 576

RAILWAYS ACT (IX OF 1890), SECTION 13—Negligence apart from the breach of any statutory duty ... .. 771

RAILWAYS ACT (IX OF 1890), SECTIONS 47, 72—*General Rules of Indian railways, rules 19, 27—Ultra vires—Contract Act (IX of 1872), sections 149, 151—“Delivery” to bailee—Liability of railway for goods accepted and allowed to remain by authorised railway servant, though no receipt granted or forwarding note received—Negligence—Sparks from engine setting fire to goods in shed—Absence of fire extinguishing appliances.* A consignment of bales of hemp was taken to a railway station and tendered for despatch to another station. It appeared that no wagon was immediately available for the purpose; so the consignment was, with the consent and permission of an authorised servant of the railway, deposited in the railway goods shed and allowed to remain there, pending arrival of a suitable wagon. No forwarding note was tendered by the consignor, and no receipt was granted to him by the railway. The next day a part of the consignment which was lying in the goods shed was destroyed by fire caused by sparks from an engine alighting on the hemp.

*Held* that, in the circumstances, the goods had been delivered to the railway within the meaning of section 149 of the Contract Act and the railway had become a bailee in respect

thereof, although neither a receipt had been given nor a forwarding note tendered. Under section 72 of the Railways Act the liability of a railway is that of a bailee in respect of goods delivered to it for transportation; and any rule, made by the railway under section 47 of the Act, by which the railway attempts to escape that liability is a rule which is inconsistent with the Railways Act itself and is therefore *ultra vires*. Rules 19 and 27 of the Indian Railways General Rules, which purport to provide that in no circumstances will the railway be liable for loss of goods unless the formalities of a forwarding note and a receipt have been complied with, are therefore *ultra vires*. Where goods intended for despatch have in fact been delivered to and accepted by the railway, the mere non-compliance with these regulations will not affect the liability of the railway.

There is no distinction in principle between the case of failure to grant a receipt and the case of failure to tender a forwarding note.

*Held*, also, that the facts that the hemp was stored within 30 or 40 feet of the running line, that no shield was provided to prevent sparks from passing engines alighting on combustible materials stored in the shed, and that the railway provided no adequate arrangements or appliances for putting out fires in the shed, although such fires had occurred before, proved that the railway was grossly negligent in failing to make adequate and reasonable provision for the protection of the goods and was therefore liable for the loss.

Secretary of State for India *v.* Sheobhagwan Chiranjilal,

I. L. R., 58 All. ... 576

REGISTRATION ACT (XVI OF 1908), SECTION 17(2)(i)—Composition deed assigning the debtor's property in trust for the benefit of creditors—Whether registration necessary ... 505

RES JUDICATA—Order deciding who is legal representative, *See* Civil Procedure Code, order XXII, rule 5 ... 734

RIGHT TO BEGIN, *See* Criminal Procedure Code, sections 99A, 99B, 99D ... 849

RIPARIAN OWNERS—*Natural rights of user in respect of natural streams—Reasonable and equitable user—Damming up the river for the purpose of a mill—Whether material injury caused thereby to a riparian owner higher up the stream in using it for his own mill—Question of degree—Suit for damages—Prescriptive rights and Natural rights, scope of—Easements Act (V of 1882), sections 7, illustration (h), 23 and 29, illustration (a).]* All that the law relating to the natural rights of riparian owners to use the water of a natural stream requires of a party, by or over whose land the stream passes, is that he should use the water in a reasonable manner, and so as not to destroy or render useless or materially diminish or affect the application of the water by the proprietors above or below him on the stream. He has a right to the use of it for any purpose, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition he may dam up the stream for the purpose of a mill, but not if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury. This principle has been adopted in section 7, illustration (h), of the Easements Act.

The plaintiff and the defendant were riparian owners each of whom was utilising the water of a flowing river, by means of dams and sluices, for driving the wheels of his flour mill. The defendant's mill was about two miles further down the

stream than the plaintiff's mill. Later, the defendant raised the height of his dam and sluices, with the result that the water accumulated at the plaintiff's causeway and the level of the water near the blades of the plaintiff's mill was raised by 11 inches, causing a loss of about 23 per cent. of the available power. The plaintiff sued for damages; the right claimed by him was not a prescriptive right, as his mill had been in existence for less than 20 years, but the natural right of riparian owners: *Held*, that the act of the defendant was not such an interference with the natural rights of the plaintiff as would give rise to a claim for damages, as it did not prevent the plaintiff from exercising his natural right of making use of the water for the purpose of a mill; all that it had done was to cause a slight diminution in the efficiency of the existing mill of the plaintiff, which could obviously be remedied by raising his mill and, if necessary, his dam by a corresponding height of 11 inches. Had the plaintiff already acquired a prescriptive right to use that particular mill in that particular manner in which he had been using it, only then could the suit for damages have been brought. In the absence of such a prescriptive right, the plaintiff had only the natural right to have a mill on the river and to use the water to work it; and the act of the defendant did not destroy or prevent the exercise of such natural right of the plaintiff. A right to the continuance of particular conditions of the water of a stream for the working of a particular mill could be acquired by prescription, and was not a natural right, as would appear from section 29, illustration (a) of the Easements Act.

Murli v. Hanuman Prasad, I. L. R., 58 All. ... 981

RULES UNDER SECTION 12 OF BAR COUNCILS ACT, RULE 11—Bench of three Judges considering Bar Council Tribunal's finding—Opinion of majority to prevail ... 406

SEDUCTION OF A WIFE—*Enticing away a wife and attempt at seduction—Actionable wrong—Loss of society and services—Husband's suit for damages—Limitation Act (IX of 1908), articles 22, 120.* [The enticing away of a wife by a third person is an infringement of the absolute right of the husband to the benefit of the society and services of the wife, and the husband can maintain a suit for damages for such actionable wrong. It is immaterial that at that time the husband may have been away at another town; it is not the mere depriving of a husband for a day or two of the society of his wife which gives rise to the action, but the fact that the defendant has acted in a way towards the wife of the plaintiff which is an infringement of the plaintiff's right under the contract of marriage. The case of a wife, therefore, stands on a different footing from that of seduction of a daughter or a servant.]

The husband's suit for damages is not governed by article 22 of the Limitation Act, not being a case of injury to the person of the plaintiff, but by article 120.

Sobha Ram v. Tika Ram, I. L. R., 58 All. ... 503

SHAH JOG HUNDI—*Negotiable Instruments Act (XXVI of 1881), sections 1, 5, 13—Bill of exchange—Negotiable instrument outside the Act—Mercantile usage—Liability of indorser to indorsee.* [A Shah jog hundi is not a bill of exchange as defined in section 5 of the Negotiable Instruments Act, as it is not an order directing the drawee to pay either to a certain person named, or to the bearer of the instrument. It is, therefore, not a negotiable instrument as defined in section 13 of the Act.]

The Negotiable Instruments Act, however, deals with only three specified classes of negotiable instruments, namely promissory notes, bills of exchange and cheques, as defined in the



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Act, and it does not deal with other kinds of negotiable instruments. Section 1 of the Act provides that the Act does not affect any local usage relating to any instrument in an oriental language. Such an instrument may therefore be a negotiable instrument independently of the definitions of the Negotiable Instruments Act, if the character of negotiability has been impressed on it by established mercantile usage.

A Shah jog hundi has been treated and recognized by Indian custom and law as a negotiable instrument, although it does not come within the definition of a bill of exchange in the Act; and it being a negotiable instrument, the general provisions of the Act will be applied and an indorser is liable to the indorsee in case of the drawee's failure.

Mangalsen Jaideo Prasad v. Ganeshi Lal, I. L. R., 58 All. 858

SPECIFIC PERFORMANCE—Contract not to claim a future inheritance 834

SPECIFIC RELIEF ACT (I OF 1877), SECTIONS 39, 40, 42—Distinction between suit for cancellation of instrument and suit for declaration that an instrument is void as against plaintiff ... 146

SPECIFIC RELIEF ACT (I OF 1877), SECTION 42—Suit for declaration by dismissed public servant that his dismissal was wrongful—Suit not maintainable ... 40

STAMP ACT (II OF 1899), SECTIONS 2(5) AND 6; SCHEDULE I, ARTICLES 5, EXEMPTION (a), 15, 41, 43—*Bond—Mortgage of crops—Agreement—Agreement for sale of goods or merchandise exclusively.*]

(1) Where a document, attested by witnesses, was executed, mortgaging the standing sugarcane crop and the next year's crop on the executant's fields against an advance received from the mortgagee, and also stipulating to supply the said crop exclusively to the mortgagee at a certain rate:

*Held*, that the document was, firstly, a mortgage of crops, falling under article 41 of schedule I of the Stamp Act; and, secondly, it was a bond as defined in section 2(5)(c) of the Act as it contained a specific stipulation, which was over and above the transaction of mortgage and not a necessary or integral part thereof, by which the executant undertook to deliver the sugarcane crop to the other party exclusively, and therefore falling under article 15 of schedule I of the Act. As the document filled this dual character, the higher of the two stamp duties was payable, in accordance with section 6 of the Act.

This document did not come within exemption (a) under article 5; for the document, taken as a whole, could not be considered to be a mere agreement, as an interest in property was created thereby, and it was a mortgage and not merely an agreement. Apart from this, the exemption did not apply for the reason that the document was not "exclusively" an agreement for the sale of goods or merchandise, in view of the fact that it was also a combination of a mortgage of crops and a bond.

(2) Where a document was a simple agreement to sell sugarcane crop, and it set forth that the vendors had received an advance from the purchasers which would be set off against the price of the crop supplied, and there was no hypothecation of any crops, and although there were several subsidiary covenants the document evidenced only one transaction of sale and no other independent transaction:

*Held* that the document was an agreement for or relating to the sale of goods or merchandise exclusively and came under exemption (a) in article 5 of schedule I of the Stamp Act.



(3) Where a document, attested by witnesses, was in substance an agreement for supply of sugarcane by the executant to the other party, to be paid for at certain rates, and no advance had been made nor was any hypothecation created of existing or future crops:

*Held* that the document was not a bond but an agreement for or relating to the sale of goods or merchandise exclusively and came under exemption (a) of article 5. Even if it was assumed that the document filled a dual character and could be regarded both as such an agreement and as a bond, article 15 would not apply as article 5 specifically provided for such an agreement and therefore excluded the operation of article 15.

The definition of a bond given in section 2(5)(c) clearly contemplates cases in which the agreement is merely to deliver grain or other agricultural produce, which is the principal if not the sole obligation incurred under the agreement. Where, however, delivery of grain or other agricultural produce is incidental or merely ancillary to the obligation to sell grain or other agricultural produce, such agreement is not a mere bond but an agreement to sell goods, and the case falls not under article 15 but under article 5 so as to attract the application of exemption (a).

Reference under the Stamp Act, I. L. R. 58 All. ... 1083

SUBROGATION—Puisne mortgagee paying off prior mortgagee's decree—Whether a fresh charge is acquired thereby. *See* Transfer of Property Act, sections 74, 92, 95 ... 602

SUCCESSION ACT (XXXIX OF 1925), SECTION 63—*Will—Attestation—Attesting witnesses not signing but affixing their marks—Validity—“Sign”—General Clauses Act (X of 1897), section 3(52)—Interpretation of statutes—Ambiguity.* A will is validly attested, within the meaning of the provisions of section 63 of the Succession Act, if either of the two necessary attesting witnesses has merely affixed his mark to the will.

In view of the definition of “sign” as given in section 3(52) of the General Clauses Act the word “sign” in clause (c) of section 63 of the Succession Act should be interpreted to include affixing a mark, although the section is ambiguous inasmuch as a distinction has been drawn in clauses (a) and (b) of the section between signing and affixing a mark.

Where a section is ambiguous and two interpretations are possible, that interpretation should prevail which is most consistent with reason, common sense and convenience.

Maikoo Lal v. Santoo, I. L. R., 58 All. ... 1064

SUCCESSION ACT (XXXIX OF 1925), SECTION 133—Invalidity of ulterior bequest does not affect valid prior bequest ... 467

SUCCESSION ACT (XXXIX OF 1925), SECTION 306—Survival of cause of action—Liability of estate of deceased perpetrator of fraud ... 342

SUCCESSION ACT (XXXIX OF 1925), SECTION 379—Deposit under this section not conclusive as to the amount of court fee chargeable on the succession certificate when it comes to be issued ... 752

SUCCESSION CERTIFICATE—*Court Fees—Rates enhanced by Amending Act after application for succession certificate—Court fee payable according to provisions in force at the date of issue of the certificate—Court Fees Act (VII of 1870), section 6—Succession Act (XXXIX of 1925), section 379.* Under section 6 of the Court Fees Act the court fee prescribed for a succession certificate is payable on the certificate itself and not in respect of the application for the issue of a certificate. The succession certificate is to be stamped with the proper court fee at the

time when it comes into existence as a succession certificate, that is at the time when it is executed by the court, and the amount of fee payable must be calculated according to the Act in force on that date.

No doubt, under section 379 of the Succession Act a deposit has to be made, along with the application for a succession certificate, of a sum equal to the court fee payable on the certificate and the court examines whether the deposit is sufficient according to the Act then in force, but that is only for the purpose of deciding whether it should proceed to consider the application or should refuse to consider it. But the relevant date for the calculation of the correct amount of court fee to be affixed is not the date when the application is made; it is certainly either the date when the certificate is drawn up or perhaps the date when the court passes an order that such certificate should be drawn up.

Gurcharan Prasad v. Secretary of State for India,  
I. L. R., 58 All. ... 75\*

THEKADAR—Covenant against reduction of rent upon remission of revenue—Validity ... 998

TORT—Damages for fraud—Liability of estate of deceased perpetrator of fraud ... 342

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TRANSFER OF PROPERTY ACT (IV OF 1882), SECTION 6(a)—Contract not to claim a future inheritance ... 834

TRANSFER OF PROPERTY ACT (IV OF 1882), SECTIONS 52, 74, 92—*Lis pendens*—Subrogation—Third mortgagee paying off first mortgage after second mortgagee's decree—Fresh period of limitation does not accrue ... 912

TRANSFER OF PROPERTY ACT (IV OF 1882), SECTIONS 74, 92, 95—*Subrogation—Third mortgage executed after first mortgagee's decree—Third mortgagee paying off first mortgagee's decree to which second mortgagee was a party—Rights and powers arising out of such payment—Subrogation to right of priority as against second mortgagee's suit—Fresh charge enforceable within 12 years of the payment—Limitation Act (IX of 1908), article 132.] Held (GANGA NATH, J., dissenting) that where a property has been the subject of two simple mortgages and a suit has been brought for sale on the first mortgage and decreed against the second mortgagee also; and subsequently a third mortgage is taken and this mortgagee has paid the decretal amount, but has not obtained possession of the property; when the second mortgagee brings a suit for sale and makes the third mortgagee a party, the third mortgagee is entitled to claim a right of subrogation for the amount which he paid in discharge of the decree in the earlier mortgage suit, even though the period of limitation for a fresh suit on the first mortgage would now be barred.*

Where a subsequent mortgagee redeemed a prior mortgage, he acquired under section 74 of the Transfer of Property Act only the rights and powers of the prior mortgagee and was entitled to bring a suit on the basis of that mortgage within 12 years of the mortgage; he acquired no fresh charge. But where a suit had already been brought on the original mortgage and had ripened into a mortgage decree, the mortgage merged in the decree and the rights and powers of the mortgagee decree-holder were those under the decree, which was alive at the time and which gave him a priority over subsequent encumbrancers and entitled him to recover his amount by sale of the property without any bar of limitation of 12 years from the date when the mortgage money became due. The payment of such a decree conferred on the subsequent

encumbrancer all the substantive rights and powers of the mortgagee decree-holder as then subsisting, though the procedure to be followed by him had to be different as he was not an assignee of the decree.

The position has now been made clearer by the amendments to the Transfer of Property Act, and the right of subrogation conferred by the new section 92 is in no way narrower but really wider in scope than that conferred by the old section 74. From the provisions of the new section 92 it follows that the payment of the mortgage decree confers upon the person who pays it off a statutory right under that section, which right is not identical with the rights of an assignee of the mortgage but is an acquisition of a fresh charge, enforceable within the period of limitation applicable to such a suit. Article 132 of the Limitation Act would apply when the charge is sought to be enforced and the limitation of 12 years would run from the date when the decretal amount was paid off and the statutory right acquired.

Alam Ali v. Beni Charan, I. L. R., 58 All. ... 602

TRANSFER OF PROPERTY ACT (IV OF 1882), SECTION 82—*Contribution* —“Contract to the contrary” refers primarily to a contract between the co-mortgagors—Implied contract against contribution where one mortgagor is really a surety for the other—Whether contract against contribution can run with the land —Evidence Act (I of 1872), section 92—Whether contract among co-mortgagors in modification of the statutory rule of contribution can be proved.] Where a mortgage deed has been executed by two persons, each of whom has mortgaged his own property, a contemporaneous agreement between the co-mortgagors can be proved to the effect that one of them was the real debtor who took the whole money and the other was merely his surety and that in the event of the whole of the mortgage money being realised from the property of the principal debtor he would have no right of contribution as against the property of the surety. Section 92 of the Evidence Act does not bar the proving of such agreement, for it does not vary the terms of the contract expressed in the deed of mortgage inasmuch as there is no covenant in that deed regarding the right of contribution as between the co-mortgagors; the right of contribution arises only out of the statutory provisions of section 82 of the Transfer of Property Act. Further, the words “as between the parties to any such instrument” in section 92 of the Evidence Act would refer to the persons who on the one side and on the other come together to make the contract and would not apply to questions raised between the parties on the one side only of a deed, regarding their relations to each other.

From the terms in which section 82 of the Transfer of Property Act is expressed, there is no justification for concluding that “a contract to the contrary” mentioned therein is a contract between the mortgagor and the mortgagee. In fact the mortgagee has no interest in the question of contribution as between the various parts of the mortgaged property, for he is entitled to proceed against the whole or any part of the mortgaged property. There is thus no reason why he should be a necessary party to any contract which involves the right of contribution, and the “contract to the contrary” would therefore be a contract between the co-mortgagors. Such a contract would include an implied agreement between the surety and the principal debtor. The owners of two mortgaged properties may contract themselves out of the rule contained in section 82; and as such a contract operates between the co-mortgagors alone.

the mortgagee is not a necessary party, and his not being a party can not make the contract unenforceable as between the co-mortgagors.

But the agreement, in modification of the rule of contribution laid down in section 82, between the mortgagors being personal will not run with the land, and a transferee for value without notice from one of the mortgagors will not be bound by the personal undertaking of his transferor and can not be deprived of the statutory right of contribution which attaches to the land transferred to him.

Khudawand Karim v. Narendra Nath, I. L. R., 58 All. 548

TRUSTS ACT (II OF 1882), SECTION 5—Composition deed assigning the debtor's property in trust for the benefit of creditors—Whether registration necessary ... 505

U. P. GENERAL CLAUSES ACT (LOCAL ACT I OF 1904), SECTION 1(2)—How far "act" includes "illegal omission" ... 16

U. P. LAND REVENUE ACT (LOCAL ACT III OF 1901), SECTIONS 111, 233(k)—Question of title in partition proceedings—Objection by one of two Hindu daughters as to validity of title of an alienee from the other daughter—Decided against objector—Suit by her for possession of the other daughter's share after her death—Whether suit barred ... 391

U. P. TOWN IMPROVEMENT ACT (LOCAL ACT VIII OF 1919), SECTIONS 57, 59(6)—*Tribunal determining amount of compensation—One of the assessors absent on one day of hearing, when some witnesses were examined—Substantial error or defect in procedure—Jurisdiction.* A Tribunal constituted under the U. P. Town Improvement Act was engaged in hearing a case regarding the determination of the amount of compensation to be paid for an acquisition. One of the three members of the Tribunal was absent on one day, on which three witnesses were examined. On a subsequent day all the members were present and the case was argued and a judgment was given in which all the three members concurred:

*Held*, that owing to the absence of one of the members on a date when evidence was heard the Tribunal had no jurisdiction to give the judgment and it must be set aside. Section 59(6) of the U. P. Town Improvement Act shows that the Act contemplates that when one member is temporarily absent another member must be appointed in his place and it is not possible for the Tribunal to proceed in the absence of a member. Section 64(1)(b) empowers the President of the Tribunal to give a decision alone in certain matters, but the determination of the amount of compensation is not one of such matters.

There being want of jurisdiction, and not merely a substantial error or defect in the procedure, it was immaterial whether it could or could not be shown from the record that a material error had arisen in the judgment owing to the absence of one of the members on a date on which the three witnesses had been examined.

Secretary of State for India v. Nuran Bibi, I. L. R., 58 All. ... 1079

U. P. TOWN IMPROVEMENT (APPEALS) ACT (III OF 1920), SECTION 3(1)(b)—*Certificate that the case is a fit one for appeal—Form of certificate—Merely granting leave to appeal not sufficient—Appeal incompetent—Special leave to appeal—Should not be granted where appellant wishes to raise a point of law the opposite of which was urged by him and adopted by the lower court—Practice and pleading.* Under section 3(1)(b) of the U. P. Town Improvement (Appeals) Act the certificate, which

when granted by the President of the Tribunal gives a right of appeal to the High Court, should state that the case is a fit one for appeal. The section therefore requires the President to be satisfied that the case is a fit one for appeal, i.e. that the questions involved are such that it is desirable in the interests of justice that the matter should be considered by a higher court; and it is essential that the certificate should show clearly upon the face of it that the President has considered the application for leave to appeal upon its merits and has come to the conclusion that the case is a fit one for appeal.

An order passed by the President, on the appellant's application for sanction to go up in appeal, in the terms "Sanction to go up in appeal is granted as prayed" was not a sufficient compliance with the terms of section 3(1)(b) and did not give the appellant a right of appeal to the High Court; there was nothing to show that the President applied his mind to a consideration of the grounds and came to a conclusion that the questions involved were such as to make the case a fit one for appeal; on the other hand it appeared from the record that the grounds of appeal were not even fully disclosed before the President.

In a case where a party had urged before the Tribunal to adopt a particular method of valuation to ascertain the market value of the property and the Tribunal had adopted it, and then the party wanted to appeal to the High Court on the ground that the method of valuation adopted by the Tribunal was wrong, and prayed for special leave to appeal under section 3(1)(b)(iii) of the U. P. Town Improvement (Appeals) Act, it was *held* that special leave to appeal should never be granted in such circumstances.

Secretary of State for India *v.* Zahid Husain, I. L. R.,  
58 All. ... 758

VAKALATNAMA—Formal defect—Containing name of one vakil but signed by another who was in fact appointed—Defect immaterial 912

WORKMEN'S COMPENSATION ACT (VIII OF 1923), SECTIONS 2(g) AND 4(1)(C); SCHEDULE I—"Permanent partial disablement"—*Index and middle fingers of right hand crushed and had to be amputated—Loss of use of the other fingers—Calculation of compensation.*] Having regard to the definition of "permanent partial disablement" in section 2(g) of the Workmen's Compensation Act, what the court has got to see is whether the earning capacity of the workman has been reduced in every employment which he was capable of undertaking at the time of the accident and not merely the particular employment in which he was engaged at the time of the accident resulting in the disablement. So, where a workman, employed as a blacksmith fitter, had the index and the middle fingers of his right hand crushed while on duty so that they had to be amputated, and the finding of the Commissioner was that he had become permanently incapable of performing the duties of a blacksmith fitter with that hand, it was *held* that the workman was not entitled to compensation calculated as for the loss of the thumb and all the fingers of the right hand, in accordance with section 4(1)(C) and schedule I of the Act, unless upon a further finding that there was a complete and permanent loss of the use of the thumb and the remaining fingers of the hand, which would be equivalent, according to the note to schedule I, to the loss of the thumb and the fingers.

Upper Doab Sugar Mills, Ltd. *v.* Daulat Ram, I. L. R.,  
58 All. ... 976